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IN THE

Supreme Court of the United States

October Term, 1968

No. 306

FORTNER ENTERPRISES, INC.,
Petitioner,

vs.

UNITED STATES STEEL CORPORATION and
U. S. STEEL HOMES CREDIT CORPORATION,
Respondents.

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Questions Presented

1. Will the grant of summary judgment dismissing a treble damage antitrust action be reversed where the plaintiff has completed discovery, states that the evidence includes "all of the pertinent material" to its cause, asserts that on such evidence it is "entitled to a directed verdict" on the issues of liability, disputes no material fact and argues here a new theory of its case never urged before either the District Court or the Court of Appeals?

2. Where a seller of prefabricated houses finances land acquisition and development and home construction in a single 55 acre subdivision of 219 lots for a buyer entering the housing development business upon the condition that the seller's houses be purchased for each lot only as long as the money advanced has not been repaid, is there "an illegal tying agreement which is a *per se* violation" of the Sherman Act in that the financing is "unique" to the buyer because "not available elsewhere at all" or on as favorable terms, the most substantial amount of commerce affected in any year amounting to 55 houses totaling $189,002 (70 houses totaling less than $250,000 over three years)?

Statement of the Case

The complaint in this action, as amended, alleges violation by the defendants of Sections 1 and 2 of the Sherman Act (c. 647, 26 Stat. 209, as amended, 15 U.S.C. §§1, 2). It alleges a conspiracy by the defendants to force plaintiff and others to purchase defendants' prefabricated houses as a condition to obtaining financing. The complaint alleges that the houses furnished plaintiff were defective, that because of the defects plaintiff was able to complete only 70 of 219 contemplated houses, that defendants thereafter foreclosed on the financed property, and that plaintiff has been damaged to the extent of (1) the cost of repairing the defects, (2) being delayed in completion of the planned homes so that it could not go forward with its development, (3) losing profits on both the houses built and those not built, (4) having its reputation as a builder irreparably damaged because the homes built were in-

ferior, (5) the sale of its property on the foreclosure at less than its fair market value, and (6) the purchase of defendants' houses at "unreasonably high prices." Under Sections 4 and 16 of the Clayton Act (c. 323, 38 Stat. 731 and 737, as amended, 15 U.S.C. §§14, 26), plaintiff seeks to treble these alleged damages (18a-55a, 239a-268a).

Defendants sought and the District Court granted summary judgment dismissing the complaint, and the Court of Appeals for the Sixth Circuit affirmed *per curiam*. In essence, it was plaintiff's claim below that it and others were "coerced" by "economic necessity" to buy defendants' prefabricated houses because the financing made available by defendants was either not available at all from other sources or was not available on as favorable terms. Therefore, plaintiff claimed, defendants had conspired to restrain trade and to monopolize the house market by offering "unique" financing conditioned upon the purchase of their houses, such a tying arrangement thus constituting a *per se* violation of the Sherman Act.

There is factual dispute between the plaintiff and the defendants as to the alleged defects in defendants' houses, the reasons for plaintiff's abandonment of its housing development, and the causes for any losses it allegedly incurred. Thus, of a total of 70 houses purchased from defendants, plaintiff claims the delivery of faulty and defective materials for each and every one and that defective components caused delay in plaintiff's construction of each of the 70 houses (116a-118a, 134a-137a). None of the facts disputed in this area, however, is material to the antitrust issues comprehended by the complaint and the judgment

below. At most, these facts might be pertinent to a common law claim for breach of contract, breach of warranty or other non-antitrust cause of action.

Defendants in this statement set forth the evidence of record in considerable detail to demonstrate that, drawing all reasonable inferences in favor of plaintiff as mandated by Rule 56 of the Federal Rules of Civil Procedure, neither below nor in its brief here has plaintiff set forth evidence showing that there is a genuine issue as to any fact material to its antitrust claim. Moreover, the detailed record treatment is offered to facilitate this Court's independent review apart from the opinion of the District Court, since the decision of a lower court will be affirmed if the result is correct even though the decision relies upon wrong grounds. *Helvering* v. *Gowron*, 302 U. S. 238 (1937).

Defendant United States Steel Corporation, through its Homes Division, manufactures component parts for prefabricated houses, selling these "home packages" in various states primarily through franchised dealer-builders like the plaintiff. It also has a wholly owned subsidiary, U.S. Steel Homes Credit Corporation, founded in 1954 with a paid-in capital not in excess of $2 million generating an estimated fund of $12 to $16 million available for loans[1] (753a-759a).

The purpose behind the establishment of the Credit Corporation was, by furnishing financial assistance to

1. Credit Corporation's total funds available for lending have varied from $6 to $9 of funds borrowed from outside sources for every dollar of invested capital or intercorporate (parent-subsidiary) debt (830a).

Homes Division dealer-builders unable to obtain the same sort of assistance from normal sources, to compete with other prefabricated house manufacturers, lumberyards, brick factories and other building material manufacturers who provide such assistance to their customers (756a-758a, 821a, 828a, 851a-852a).

The Credit Corporation makes its financing available solely to franchised dealer-builders of the Homes Division and solely for the purpose of constructing Homes Division houses.[2] To make it possible for these dealer-builders to construct such houses, the Credit Corporation will also finance the acquisition of unimproved real estate to be held for future subdivision development, the acquisition of real estate already subdivided, or the improvement and development of real estate as subdivisions (164a, 166a).

The Credit Corporation's loans are all conditioned upon the construction of Homes Division houses and are made against mortgage security with provisions for partial releases of individual building lots when improved with such houses. The uncontradicted evidence, however, is that the borrower may at any time terminate his obligation to use Homes Division houses simply by retirement of the loan. No loan imposes any continuing requirement to use Homes

2. The president of the Credit Corporation testified: "The decision to get into a financing operation to aid the Homes Division contemplated that loans would be made where it served to supplement —augment—the sales of the Homes Division. So that, as long as a loan was outstanding, we expected that the U. S. Steel Homes products would be used. Otherwise, there was no reason for the loan, because we're not in the financing business, per se. * * * [T]he Credit Corporation is not in the general lending business, and * * * every loan it makes is designed to aid in the distribution of [the Homes Division] product" (838a-839a).

Division houses after the loan is retired or in connection with property which has not been acquired, developed or improved with the proceeds of the Credit Corporation loan (167a-168a, 838a, 880a). In fact, dealer-builders have set up programs with the Homes Division, borrowed the money from the Credit Corporation, developed lots and then offered the complete development to an investor, paying off the Credit Corporation and never building a Homes Division house[3] (377a).

The Credit Corporation's borrowers "are not prime financial risks" and its financing is not "on strictly sound banking principles" in the sense that none of its loans is a "bankable loan," and if the Credit Corporation had an application for such a loan it would refer the dealer-builder to a bank (857a). The uncontradicted evidence, however, is that most of the Credit Corporation's loans, even though not "bankable loans," have been made on the basis of sound and reasonable financial practices (832a). When its regular program of loans has been inadequate to enable the Homes Division to attain minimum national distribution levels,[4] the Credit Corporation has been authorized

3. Because of such activities by dealers, sometime after plaintiff and defendants effected their original financing arrangements in October, 1960, the Homes Division began asking for collateral or contingent liability 5% notes not to exceed two years. Such notes would not, however, bear interest or become effective unless the dealer failed to purchase the number of houses necessary to retire his loan. For example, when plaintiff, in 1961, sought and obtained a second loan commitment totaling $462,400 from Credit Corporation, a collateral note in the amount of $2,950 (equal to 5% of the Land Note of $59,000) was taken. As the vice president of the Credit Corporation testified, "* * * [w]hen a man uses our facilities, or intends to use them, simply as a convenience to himself, to make a profit in land development and speculation, we feel we are entitled to some additional compensation. * * *" (244a, 377a, 866a-870a)

4. *E.g.*, a target of 1800 units in 1959 (763a).

since 1958 to offer and occasionally has offered special financing to selected dealers "without conformity [to] conventional or conservative patterns but within the bounds of prudent business judgment" (763a-766a, 832a-833a). Again the uncontradicted evidence is that this special financing was responsive to competition in the building industry requiring the acceptance of greater risks by lumberyards, brick factories, prefabricators and others (858a).

All financing by the Credit Corporation is individually negotiated with each dealer-builder in the light of his particular circumstances (827a-828a, 853a). The differences between the Credit Corporation's "regular" and "special" financing operations apply solely to those loans made for land acquisition and development, not loans made for construction (366a-385a). As plaintiff states, the record shows "that the ordinary financing program on land acquisition and development was a 60% loan * * *"[5]

5. The Homes Division Sales Manual states: "So far * * * we have discussed: Permanent financing which finances our product for the home owner; construction financing which finances the construction of our product for the dealer. In all cases to this point we have financed our product, and now we have to finance a piece of ground where we hope and expect to build our product, but, more often than not, the Credit Corporation has to disburse a sizeable amount of money before we even ship one model. There are no buyers waiting in line, there are no houses to sell, there's just a piece of raw earth. So it is, from our standpoint, a higher risk loan and must be scrutinized much more closely than any other type. * * * The Credit Corporation can make loans in an amount up to 60% of the combined cost of land and the development of that land or a portion thereof. In other words, if the total estimated cost is $100,000—to use round figures—the Credit Corporation can lend up to $60,000 to develop this land, the dealer putting his $40,000 in first and, I might add, the Credit Corporation taking their $60,000 back out first. As a more general rule of thumb, if the dealer has clear title to the land, the Credit Corporation can make the full development loan. This would usually be classed as standard unless for some reason the development costs were too far out of line. * * * There will be two notes—one for

(Br.,[6] p. 8). The special financing was described by the president of the Homes Division as follows:

> "Beyond the 'regular' program of financing assistance offered to qualified builders and negotiated by the Credit Corporation, there exists a program of 'special' assistance which provides a greater amount of interim financing participation in selected markets with selected dealers. Fortner represents one of the latter. In these cases our sales department, in an attempt to obtain distribution in a new market or to supplement distribution in an existing market, will discuss the possibility of a building program using U. S. Steel Homes with a dealer who is believed to have the necessary qualifications to be successful. Frequently the builder states a need for substantial interim financing to support the program and after commercial evaluation and a satisfactory preliminary check of credit and reputation, a recommendation is forwarded to U. S. Steel Homes Credit Corporation that negotations be undertaken to arrive at a satisfactory basis for financing assistance consistent with the conditions which exist in each instance. In certain cases where Credit Corporation states that the amount of assistance provided in relation to the value of the security is beyond the normal limits of a purely financial transaction, Homes Division underwrites the ar-

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the land development loan portion and one for the construction loan portion—secured by one mortgage on the land. * * * So, to recap, a standard land deal means simply—up to 60% of the combined cost of land and development or if the dealer owns the land, 100% of the development cost. This on a one or two year basis at ½ of 1% fee plus 6% interest. Loan to be paid back in 75% or fewer of the lots to be developed dependent upon a release value per lot based usually on the estimated average valuation anticipated from FHA or VA. * * *" (373a-379a)

6. "Br." references are to the plaintiff's brief filed with this Court. "CAB" references are to plaintiff's principal brief before the Court of Appeals.

rangement so as to protect Credit against potential losses. Our agreement with Fortner is in this category'' (362a-363a).

Of the special loans actually made to others than plaintiff, the sole evidence is that ''each one [was] a little different'' and was based upon the dealer's insistence that he needed assistance beyond the regular program (381a). Further, the Homes Division Sales Manual emphasized that 100% loans for land acquisition and development should not be offered to new dealers.[7]

As plaintiff states, it ''was a corporation in existence in 1959 principally owned by Mr. A. B. Fortner * * *''[8] (Br., p. 3). Mr. Fortner ''had available in 1959, through another corporation in which he owned an interest, certain land in Jefferson County, Kentucky [Louisville] suitable for subdivision purposes.'' He states that he was contacted by Homes Division representatives ''concerning the building of prefabricated homes * * * on said land * * * and was told that very attractive financing was available from * * * Credit Corporation'' (289a-290a, 438a). At

7. ''It is always best, if possible, to try to find out what the dealer requires and, if possible, adjust our program to meet his needs, rather than to 'lay out' a set of rules which might not fit and might cause the dealer or prospect to lose interest. Further, you might say to him that we would go up to 60% and he only requires 40 or 50%, in which case he might try to get 60%. If you are pinned down to a definite answer, you might then just spell out the standard terms and then tell him, 'if this doesn't fit your program, you tell us what is needed and we'll see what can be done.' You should make it clear to a new or prospective dealer who is applying for his first loan from the Credit Corporation that they will not consider 100% of the security. That is, the dealer must have some equity in one form or another in the deal. * * *'' (381a)

8. Mr. Fortner owned all of the outstanding common voting stock of plaintiff other than one share owned by his wife (113a).

that time the Homes Division had a wholly negligible position in the Louisville market.[9] Homes Division was interested in Mr. Fortner and plaintiff as a means of expanding its entry, broadening its distribution and trying to improve its participation in that local market (801a, 809a, 839a-840a).

Mr. Fortner originally proposed in December, 1959 to transfer to the plaintiff 99 lots of the land held by his other corporation. The existing equity in that land was $56,000, the current indebtedness for it was another $56,000 and the initial estimate was that the cost of development would be $96,000, so that $152,000 financing was required for the land. Even this first proposal for financing, calling for some equity on the part of plaintiff, was "definitely in the category of special financing * * *" (385a-387a).

At a meeting on January 6, 1960, Mr. Fortner "completely changed his proposal" and "indicated that the only way he would proceed in this undertaking would be on the following basis:" (1) Credit Corporation was to finance plaintiff's acquisition of 155 undeveloped lots from his other corporation at their full cost ($170,500) and Mr. Fortner's equity was to be 31 developed lots valued at $62,000; (2) Credit Corporation was to finance development of the 155 lots at a cost of $139,500; and (3) Credit Corporation was to finance construction on the total of 186 lots for approximately $1,400,000 to be disbursed in stages as construction progressed and contracts were made for the sale of the houses (390a-392a). The president of the Credit Corpora-

9. Prior to the arrangements effected with plaintiff in 1960, the Homes Division's sales in Louisville were 13 houses at $60,178 in 1957, 2 houses at $12,261 in 1958 and none in 1959 (184a).

tion concluded that "the Fortner loan on the new basis is an extreme," and expressed concern as to whether the market would permit the dealer "to make a satisfactory return," which was essential to defendants' sale of houses[10] (634a).

Nevertheless, after insisting in March, 1960 that the proposed financing be on a two-year rather than one-year maturity basis, Mr. Fortner and his advisors were well satisfied with the arrangements and were unwilling to reduce "the loan by cutting back the number of lots * * *" (393a-394a). Even though this was the first real estate development undertaken by the plaintiff corporation, as plaintiff's interrogatory answers state, "Mr. A. B. Fortner and his personnel, by virtue of association with other companies, have had considerable experience in real estate development of the type which is the subject of this law suit" (138a).

The transaction between the parties was not finally effected until the fall of 1960 because Mr. Fortner's partner in his other corporation, which held the land, "decided that [the program] looked too good for him to relinquish his interest." Ultimately the partner decided to sell his interest to Mr. Fortner for $170,500 of the loan money

10. "[W]e should know, if possible, or at least have confidence that the dealer can make a satisfactory profit from the use of our product. With all our money out front, he has very little incentive to finish off a project. If his profits are not adequate or are not comparable to his prior experience, then we probably do not have a good loan. In making this statement, it is not the financial risks which are referred to, but rather the fact that the loan will not produce house sales. The worst thing that can happen * * * is an unsuccessful development. This precludes, in most cases, any other house sales in that area, because the one we have there has been unsuccessful" (634a).

advanced by Credit Corporation and the 187 lots were then transferred to plaintiff (395a-396a, 497a). In an affidavit, Mr. Fortner states that plaintiff was finally given "100% financing for the purchase and development of the land in question" (290a). Until that time, plaintiff had been dormant and had a deficit in excess of $16,000. Plaintiff's articles of incorporation were amended to permit it to engage in the building or real estate business just several days before it was franchised by Homes Division[11] and executed the financing arrangements with Credit Corporation at the end of October, 1960 (278a-279a, 295a).

The financing transaction between plaintiff and the Credit Corporation was evidenced by notes, a mortgage and a loan agreement[12] which provided, "This agreement, together with the notes and mortgage hereinabove described, constitute the entire agreement between the Borrower and Lender * * *" (36a). The notes were payable "on or before" specified dates and imposed no penalty for prepayment (47a-53a). The mortgage provided that upon payment of the notes "this conveyance shall thereupon become null and void" and the mortgage would be released of record (45a-46a). Nowhere does the agreement between these parties or any other evidence indicate that the loan

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11. The franchise agreement, terminable at will by plaintiff, merely authorizes purchase of Homes Division houses at prices in effect at the time of shipment for use in plaintiff's Golden Meadows Subdivision but does not restrict plaintiff from dealing with competitors or others as to houses in that subdivision or elsewhere (922a-926a).

12. 24a-53a. The total loan commitment of $2,055,300 was to be advanced according to specified progress provisions and called for interest of 6% per annum from the date of advance. A service fee of one-half of 1% ($10,275) was deducted from the principal.

agreement's conditioning of the financing upon the purchase of Homes Division houses for the mortgaged lots would survive repayment of the loans. Nor does the parties' agreement or any other evidence suggest that plaintiff was required to buy houses exclusively from the Homes Division or even to place its houses upon the mortgaged property once the loans were repaid.

Plaintiff's brief characterizes these 1960 financing arrangements as follows: "The negotiations proceeded sporadically until September, 1960. * * * Credit Corporation made very attractive offers of financing until they arrived at the point that they offered to provide maximum financing for land acquisition and development (290a). * * * This offer of financing was so unusual and unique insofar as Petitioner was concerned that through economic necessity it was accepted (290a)." Plaintiff's brief states further that the Homes Division "homes were not particularly attractive to" plaintiff (Br., pp. 5-6).

As far as the attractiveness of the houses, the cited portion of the record, an affidavit by Mr. Fortner, reads:

> "Affiant states that presentations made by the Homes Division as to the speed of erection and quality of the prefabricated home package made said product attractive to the plaintiff, but that the plaintiff would not have purchased said home packages but for the financial assistance offered by the Credit Corporation"[13] (290a).

13. Prior to the arrangements between the parties, Mr. Fortner and his associates attended a Homes Division seminar, visited its plant, and assembled cost figures on its product (386a). The Homes Division's Field Sales Manager, who discussed the program on several occasions with Mr. Fortner, was "convinced of his ability, enthusiasm and sincerity" (396a).

Nowhere in the record is there any evidence implying that Mr. Fortner or the plaintiff found the Homes Division houses unattractive or negative in any way until long after they entered into the program with defendants.[14] There is no evidence that they ever asked, or suggested that they would like, to take Credit Corporation's financing without the houses.

Throughout its brief, plaintiff, relying upon affidavits by Mr. Fortner and Mr. Edwin D. Horn, urges that not only was the financing extended by the Credit Corporation "unique" to plaintiff but "it was unique in financing circles generally in the Louisville, Kentucky area in 1960 * * *" and that "such loans were not available under the terms made at that time from any other source" (Br., pp. 6, 19, 24, 29-31). On this point, the cited affidavit of Mr. Fortner reads:

> "Affiant states that the ultimate offer of the Credit Corporation was to provide 100% financing for the purchase and development of the land in question. Affiant states that to his knowledge no such financial assistance was available to Fortner Enterprises, Inc. in 1959-1962 on the terms offered by the Credit Corporation from any other source. The offered financial assistance, particularly in terms of the 100% financing feature, was so unusual, unique as far as the plaintiff was concerned, and attractive that the plaintiff because of economic circumstances accepted the assistance offered, including conditions imposed by the Credit

14. Plaintiff's brief states, "In the present case when the burden of the restrictions became known, Petitioner, through its President A. B. Fortner (290a), also tried on at least two occasions to formally obtain relief from such restrictions and was adamantly refused. * * *" (Br., p. 20)

> Corporation that prefabricated homes manufactured by the Homes Division would be built in the subdivision" (290a).

Neither in Mr. Fortner's affidavit nor elsewhere in the record is there any showing of efforts made by him prior to the arrangements with the defendants to ascertain what financing or terms were available from other sources or the basis of his statement that "to his knowledge, no such financial assistance was available" (indeed, Mr. Fortner does not even claim that "his knowledge" was as of 1960 when the arrangements at issue here were effected). It is unclear whether plaintiff urges from this evidence the inference that financing on any terms was unavailable to it from other sources or the alternative inference that financing was available to it but on less favorable terms than negotiated with the Credit Corporation. This uncertainty is underlined by the statement in plaintiff's brief that "in the present case the Credit Corporation has used its economic power in the form of loans not available elsewhere at all or under the terms offered to force the purchase of U. S. Steel homes on the borrowers"[15] (Br., p. 21).

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15. During examination of the Credit Corporation's vice president by plaintiff's counsel, Mr. Anderson, the following colloquy took place:

> "Q. As a matter of fact, at that time, as at the time that these loans were made to Fortner Enterprises, consistent with your previous testimony here, it was and is quite obvious that financing could not be obtained from any other source to pay you off; isn't that correct? A. I can't answer that.
>
> "Mr. Reutlinger: Do you mean before or after the loan was made, and the property developed?
>
> "Mr. Anderson: I think the question is completely adequate.

(*footnote continued on next page*)

The affidavit by Mr. Horn, who is president of the Louisville Mortgage Service Company and who assisted Mr. Fortner in negotiating the financing arrangements with the Credit Corporation (393a), reads:

"Affiant states that as a result of his position with Louisville Mortgage Service Company in 1959-1962 and his contacts with the mortgage loan business in Jefferson County, Kentucky and the State of Kentucky during said period, affiant was and is familiar with the types of financing available in said area during said time. Affiant states that the type of financing package involved in the transaction between U. S. Steel Homes Credit Corporation and Fortner Enterprises, Inc., was unusual and unique during the period 1959 through 1962 in Jefferson County, Kentucky. The affiant further states that such a financing plan was not available

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"The Witness: It sounded a little more like a statement. I wonder if you could read that to me:

"Mr. Reutlinger: Property that is developed has more value than undeveloped property.

"Mr. Anderson: Would the reporter please read back the question?

"(The reporter read back the last question.)

"Mr .Anderson: I specified two particular times which I am talking about. If Mr. Dyas wants to answer the question in two parts, he is perfectly free to do so.

"A. (Cont.) At the time we made him the loan, could he have done it otherwise, and at the time he requested the concession, could he have done it otherwise; is that right?

"Q. Yes. A. Well, at the time, he said that he couldn't. He said that the reason he was coming to us was because he wanted to borrow this money to buy out a partner's interest in a subsidiary corporation. That was his representation to us. And if he could have obtained his financing elsewhere, then he simply misrepresented to us. We didn't know all the circumstances. We heard what he said. Now, at the time of this meeting, whether he could have refinanced, I certainly am not qualified to answer. I think he would be more able to refinance then, than before, having had the benefit of the incremental value of the improvements on the property." (880a-881a)

to Fortner Enterprises or any other potential borrower from or through Louisville Mortgage Service Company or from or through any other lending institution or mortgage company to this affiant's knowledge during this period. Affiant states that as a result of this type of financial assistance given by U. S. Steel Homes Credit Corporation to Fortner Enterprises, Inc., and others and somewhat similar assistance given by a few prefabricated home manufacturers or their affiliated companies in 1963 and subsequent years, Louisville Mortgage Service Company and other such organizations have been forced to offer to their customers similar 100% financing for purchase and development of land'"[16] (294a-295a).

Neither Mr. Horn's affidavit nor any other evidence offers enlightenment as to the kind of financing available from his company and others like it or whether such financing is on terms more or less favorable than "bankable loans" available from normal sources. Apart from the

16. To support the argument that financing comparable to that negotiated between plaintiff and the Credit Corporation was not available from any other source in Louisville, plaintiff's brief urges: "Empire Homes, a Louisville competitor of U. S. Steel, which priced its homes packages lower than U. S. Steel to Petitioner (350a), did not have the economic circumstances to make such loans on such terms in 1960 (295a), and therefore was excluded from competition for Petitioner's business as were the many suppliers of building materials which could have been used to build conventional homes" (Br., p. 24). This is wholly unsupported argument, however, for neither the cited nor any other portion of the record offers any indication that Empire or any other prefabricator or building material supplier was unable to or, indeed, failed to make available comparable financing and terms in 1960 or at any other time. And as the Horn affidavit shows on its face, Mr. Horn did not purport to speak as to available financing from such companies. Parenthetically, Empire's pricing in relation to that of the Homes Division is explained by the fact, attested to by plaintiff's general contractor, "that additional labor and materials to make the Empire Homes Corporation package comparable to that of the [Homes Division] B-1 Model would have been $1,034.75. * * *" (351a)

limitation of Mr. Horn's affidavit to the financing available from his company and other such organizations, its sole claim of "uniqueness," like that of Mr. Fortner's affidavit, is confined to the aspect of "100% financing for the purchase and development of land." The extent to which the Credit Corporation's financing of the plaintiff is claimed to be unique, therefore, must be measured against the loans granted for land acquisition and development, not the construction loans. Significantly, Credit Corporation's construction loan commitments to plaintiff, represented by Construction Notes No. 1 and No. 2, were $373,200 and $1,362,180, respectively, or a total of $1,735,380 (50a-53a). As to these loans, neither Mr. Fortner nor Mr. Horn claims "uniqueness."

The loan commitments for land acquisition and development, on the other hand, are represented by Land Notes No. 1 and No. 2 in the amounts of $88,000 and $231,920, respectively, or a total of $319,920 (47a-50a). Thus, if it is assumed, as plaintiff appears to urge,[17] that land financing was not available from any source on terms any better than the Credit Corporation's regular program of 60% of the cost of acquisition and development, then plaintiff got an additional $127,978 (40% of the $319,920 of Land Notes) it could not have obtained elsewhere. In terms of the entire financing commitment (Land and Construction Notes) negotiated with the Credit Corporation, plaintiff got $2,055,300 rather than the $1,927,322 which would have been

17. In its brief, plaintiff states, "That the financing under the terms and conditions offered Petitioner and many others was unique and unavailable elsewhere can be found in the Homes Division Sales Manual (374a), which indicates that the ordinary financing program on land acquisition and development was a 60% loan. * * *" (Br., p. 8)

available from sources not offering Credit Corporation's "unique" terms.

As previously noted, in specified circumstances the Credit Corporation requires Homes Division to guarantee or underwrite financing extended to dealer-builders. Such guaranties are required where the risk exceeds financial limits and instead is of purely commercial character.[18] High risk or marginal risk loans are included in the guaranty and are added or deleted as the condition of the borrower changes from time to time (815a-816, 833a). Of the original financing plaintiff negotiated with Credit Corporation, only Land Notes No. 1 and No. 2 ($88,000 and $231,920) were so guaranteed by Homes Division (443a).

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18. Plaintiff's counsel examined Credit Corporation's vice president as follows:

> "Q. What was the purpose of entering into this underwriting agreement between Homes Division and Credit Corporation? A. Well, the main purpose is this: Competition in the building industry has required the acceptance by lumberyards, brick factories, prefabricators and others, of longer and longer risks. We reached the point in the Credit Corporation some time ago that in order to compete we found—that is, in order for Homes Division to compete—we found that it was necessary to take risks which had to be classified as commercial rather than banking risks. And in those cases, then, we require the Homes Division to underwrite that risk as a commercial risk in the promotion of its business." (858a)

Homes Division's president testified that

> "* * * if it wished to recommend a loan be made to a builder-dealer, and subsequently the Credit Corporation determined that the financial aspects of such a loan indicated a relatively high risk because of the extent of capital which the Credit Corporation provided to the builder, we in turn were asked to underwrite the amount of such loans in order to protect the corporation against losses which it might incur if the builder-dealer failed to have the success in his enterprise that we commercially thought he might obtain." (816a)

Following the original arrangements effected among the parties in October, 1960 and during the balance of that year, Credit Corporation advanced $198,909 to plaintiff, and plaintiff purchased from Homes Division four model homes at a cost of $14,723 (163a, 184a). As plaintiff advised the Court of Appeals, these "four model homes were completed in February and March, 1961 and seven sales were made in March, 1961, twelve in April, seven in May, two in June and four in July, 1961, or a total of thirty-three. Thirty-three homes had construction completed including the four models through October, 1961 but twenty-one of those were completed in August, September and October (135a-137a). There were six sales in each of the months of August and September, 1961. The above indicates that sales had been going at a relatively good pace early and that construction was very slow during the first seven months of 1961" (CAB, pp. 14-15).

Mr. Fortner reported to the Homes Division "that due to serious delays in getting his United States Steel Homes program started, and further delays in starting the sold houses because of extremely wet weather all spring, and due to the fact that they had gone over their budget for advertising, furnishings, promotional materials, etc., by a considerable amount, he is in somewhat of a bind for capital." Nonetheless Mr. Fortner, on May 19, 1961, requested further financing to acquire an additional 32 lots for the construction of Homes Division houses (399a-401a). Plaintiff's outstanding indebtedness to the Credit Corporation at the time was $310,609 (645a).

Mr. Fortner requested a land loan of $54,000 (of which $24,000 was to be used to retire an existing mortgage and

$30,000 as working capital) and a construction loan of $406,400, or a total of $462,400. On June 20, 1961, at a meeting with Mr. Fortner, the Credit Corporation sought a more conservative basis of financing but "Mr. Fortner's position was that he needed the financing as requested and felt that a loan similar to that which [was] originally made was justified." At the time of this meeting, Mr. Fortner was in the process of erecting four Homes Division houses on these additional lots aided by local financing[19] (407a-411a).

Thereafter, the Homes Division recommended such financing because the additional project would be of important commercial benefit to it in Louisville, and the plaintiff was earning a profit on the sale of the houses and had in excess of 35 sales ahead which would permit liquidation of indebtedness maturing in 1961 (417a-418a). On August, 2, 1961, the additional financing was consummated for the 32 lots with a Land Note in the amount of 59,000 and a Construction Note in the amount of $403,400 (243a-268a). Only the $59,000 land loan was added to the Homes Division's guaranty agreement with the Credit Corporation (443a).

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19. The Credit Corporation representative who met with Mr. Fortner reported: "As previously indicated herein Mr. Fortner stated that he needs the amount requested over and above that required to retire the existing mortgage to replenish working capital which had been depleted to date due to various delays. In this connection, in our discussion I informed Mr. Fortner that expenditures of this nature are normally borne by all builders and in many instances represent about the only risk capital a builder provides. * * * In my opinion the expenditures heretofore made for promotional activities, model furniture, overhead, etc., represent about the only capital injection made in connection with our existing loan and another 100% loan to enable a recapture of a part of such expenditures is not justified" (411a-412a).

Mr. Fortner says that it was not until after this second financing in August, 1961 that he became aware of the extent of the allegedly defective nature of the Homes Division houses (291a). As of the end of that month, the Homes Division had shipped 37 houses to plaintiff and it had completed construction of 18 of them (135a-137a, 455a).

By the end of December, 1961, plaintiff had purchased in that year 55 houses for $189,002, making a cumulative total of 59 houses, all of which had been shipped by the Homes Division. The Homes Division reported early in January, 1962 that plaintiff's "accounts are current and relations with the dealer are excellent" (184a, 449a-450a).

In January, 1962, plaintiff ordered four more houses from the Homes Division, closed four sales with buyers and had thirteen more sales awaiting closings (448-449a). Plaintiff ordered one house in February, two in March, one in April and three in May, all of which were shipped by the end of May, making a grand total of 70 houses sold and shipped to plaintiff by the Homes Division (4 in 1960, 55 in 1961 and 11 in 1962). By the end of May, plaintiff had closed sales to buyers on 50 of these houses (428a-429a, 446a-448a). Ultimately plaintiff sold at least 62 of the houses (117a-118a).

As early as April 26, 1962, however, the Homes Division had information that Mr. Fortner was dissatisfied. At a meeting on that date, he confirmed that he was considering discontinuing his program with the Homes Division. Following this meeting, the Homes Division's Dealer Sales Manager reported that Mr. Fortner "stated that * * * it had been one series of 'minor' problems from the start,

each of which, while only a few dollars in itself, continued to pile costs on top of costs to the point where his profit margin was almost nil. Along with this, he stated he had difficulties getting clearance on buyers. The combination of product problems, loss of confidence by his sales group and difficulties in getting buyer approval made it impossible for him to carry on the volume program he had originally anticipated. Volume is his big need to maintain the prices he has established. He stated that, while we have been prompt, in most cases, in shipping replacement materials or correcting mistakes, still and all this was not the answer." Although Mr. Fortner's program had called for house sales in the $11,000 to $13,000 price range (388a), the Homes Division representative reported:

> "The most important item in our conversation was the fact that he has become convinced that his salvation lies in a $10,000 house and he is going to have this whether it is with us or with someone else. He indicated a willingness to 'let bygones be bygones' if we could furnish such a product, even if it involved special pricing in the home package from us."

The report concluded that "we are in serious danger of losing him" and that, while much of Mr. Fortner's trouble had been caused by his own construction methods, if he would present specific figures on extra costs caused by Homes Division mistakes "we should attempt to make an equitable settlement." The Homes Division Manager also "promised [Mr. Fortner] to do whatever I can to correct the problems * * * outlined" (418a-422a).

On May 4, 1962, eight days after the April 26 meeting with Mr. Fortner, the same Homes Division representative called him to arrange visits by "each of the vendor repre-

sentatives whose products [in the Homes Division house packages] apparently were in question." He advised Mr. Fortner "that we intended to vigorously follow up on these complaints and intended to eliminate these problems if at all possible. I also reminded him that, as soon as he was able to gather the specific costs and information concerning his complaints, we would like to take a look at this" (427a-428a).

On May 31, 1962, however, according to an affidavit of Mr. Fortner, "prior to the filing of this action" he arranged a meeting with representatives of the defendants at his attorneys' offices "to work out an amicable solution to the problems that were caused by the defective condition of the homes being furnished." Mr. Fortner states that he explained that the alleged defects had caused the reputation of his subdivision to deteriorate and it was "practically impossible" to sell the Homes Division houses[20] and therefore plaintiff could not continue to construct them.[21] The defendants were told that their loan could be "completely repaid if they would delete from the loan agreement the requirement that it was necessary to erect on each lot a prefabricated dwelling house manufactured by the * * * Homes Division * * *" and would permit the

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20. The evidence is uncontradicted, however, that by the beginning of May, 1962, plaintiff had completed construction of 56 houses, including the 4 model houses, and by the end of that month plaintiff had closed sales on 50 of them, at least 12 more being sold thereafter (117a-118a, 135a-137a, 429a).

21. The record suggests that the Louisville housing market may have undergone a significant slump during the pertinent period of plaintiff's dealings with defendants. While the number of single family dwellings constructed in each year of the 1958-1965 period other than 1960 and 1961 was without exception in excess of 4,000, in those two years the number fell to 3,200 (277a).

Credit Corporation's financing to be used to construct conventional homes. Mr. Fortner states that defendants refused[22] (292a-294a).

The evidence is uncontradicted, however, that Mr. Fortner was told at this meeting that if he wanted to build other houses, plaintiff should pay off the money loaned by the Credit Corporation (880a). Thereafter, even though plaintiff's accounts with both the Credit Corporation and Homes Division were current (428a-429a), as plaintiff told the Court of Appeals, "Upon the Credit Corporation's refusal to delete from the loan agreements the requirement that Homes Division homes be purchased and built, this antitrust suit was filed and no further payments were made" (CAB, p. 18).

As of May 31, 1962, plaintiff had realized a net profit of $6,000 from its development project (indeed, independent certified public accountants were unable to identify an additional $9,000 of expenses charged against profits) (430a-437a). When plaintiff instituted its antitrust action, the Credit Corporation asserted its compulsory counterclaim to collect the amount owing to it and to foreclose the underlying mortgages. The District Court ordered a separate trial for this aspect of the litigation (174a). The principal amount of plaintiff's indebtedness to the Credit Corporation was adjudged to be $253,697 (192a). Court-appointed independent appraisers valued the mortgaged properties at $261,200 as individual lots, $238,100 as several small groups, and $195,000 as three larger groups

22. In its brief, plaintiff states that its request at this meeting was met with "an adamant refusal (293a) and threats of foreclosure on the mortgages," characterized as "coercion" (Br., p. 7). Plaintiff offers no supporting citation and, in fact, the record evidences no such threats.

(219a-228a). On a distress basis at the judicial sale, the properties actually produced $206,700 (229a-231a).

Apart from its characterization of the arrangements it negotiated with defendants, the plaintiff makes the following argument as to the financing of others:

> "That the financing under the terms and conditions offered * * * many others was unique and unavailable elsewhere can be found in the Homes Division Sales Manual (374a), which indicates that the ordinary financing program on land acquisition and development was a 60% loan (374a). * * * Significantly, the Sales Manual also points out that the major competitors of the Homes Division made development loans at simple interest plus a 10% fee, whereas the Credit Corporation charged simple interest plus a ½ point fee (377a). * * * These loans were unique not only to Petitioner but to the other customers to whom they were presented. All of the loans made were not bankable loans (857a), which means that normal channels of funds were not available to such borrowers. The terms of the loans were most important to many of the borrowers including Petitioner. The [defendants] according to their own admissions went far beyond any competition by making higher percentage loans in relation to equity at more advantageous rates to the borrower. * * * (377a)"[23] (Br., pp. 8-9, 23-24).

The record, however, does not specify the terms and conditions on which any dealer other than plaintiff was in fact financed by the Credit Corporation, whether in its

23. Elsewhere, without citation to the record, plaintiff states that "there is ample proof in the record that [defendants] conspired [to offer unusual and unique financing for land purchase and development which could not be obtained elsewhere to plaintiff] as well as to all others who borrowed money from Credit Corporation. * * *" (Br., p. 19)

regular or special financing categories. Indeed, as previously noted (pp. 7-9, *supra*), the uncontradicted evidence shows only that Credit Corporation's financing is individually negotiated in the light of each dealer's particular circumstances.

To the extent that the Sales Manual upon which plaintiff relies offers any comparison of Credit Corporation's financing, it does so solely in terms of the financing offered by "other major manufacturers" of prefabricated houses (377a). It offers no comparison with "bankable loans" available in normal channels or financing of whatever character offered by Mr. Horn's Louisville Mortgage Service Company or other similar lending institutions or mortgage companies, whether in Louisville or elsewhere. As to the comparison of Credit Corporation's financing with that of the Homes Division's competitors, the Sales Manual says only that "most of the other major manufacturers make development loans in some form or another, but most of them charge a fee of 10% or more in addition to simple interest. We only charge a ½ point fee" (377a).

Neither the Sales Manual nor any other evidence (including the affidavits of Mr. Fortner and Mr. Horn) suggests that competitors of the Homes Division have not offered land financing at more than 60% in relation to the borrower's equity, as the Credit Corporation has done occasionally in its special loan classification. In fact, the record is wholly silent as to what percentage of financing was available on "bankable loans" in normal channels. The record is equally silent on what percentage loans were available from lenders in other channels, subject to the single exception that Mr. Horn's company and others like

it solely in Louisville did not offer 100% financing until 1963 (294a-295a).

Similarly, while the Sales Manual states that most of the Homes Division's competitors have charged a 10% service fee, neither the manual nor any other evidence suggests that none of them has matched the Credit Corporation's ½ of 1% charge. Indeed, neither Mr. Horn's affidavit nor any other evidence ascribes "uniqueness" to the Credit Corporation's service fee or even indicates that any such charge is imposed on "bankable loans" in normal channels or on financing by companies like those of Mr. Horn, whether in Louisville or elsewhere. Moreover, since the service fee, whether 10% or ½ of 1%, is deducted at the closing (30a-31a), thereby reducing the loan proceeds taken by the borrower, it is in the final analysis merely another element of the percentage of the loan in relation to the borrower's equity.

Plaintiff also contends that the evidence "shows that the [Credit Corporation's] restrictive loan agreements involved 68% of [Homes Division's] sales or $3,971,217.76 in 1960, 70% of sales of $2,823,383.50 in 1961, and 75% of sales or $2,289,819.00 in 1962" (Br., p. 33). This argument is mounted on the following analysis of statistics in the record:

> "The Credit Corporation in 1960 made [loan commitments] totalling $22,625,805 (675a) to achieve sales of home packages worth $3,971,217.76 (183a, 676a, 677a). For 1961 [loan commitments] of $19,342,612.00 were made to achieve sales of $2,823,383.50. In 1962 loans of $19,283,544.00 were made to achieve sales of $2,289,819.00. All of these loans with insignificant

exceptions (676a) were made with the restrictive tying agreement in the applicable loan agreements (167a)'' (Br., p. 9).

Concededly, these figures accurately represent the volume of loan commitments undertaken by the Credit Corporation upon the condition that Homes Division houses were to be placed on the mortgaged properties as long as loans were not repaid. There is, however, no evidence that these loan commitments ''achieved'' or prompted the stated volume of house sales or, indeed, how many of these commitments carried through to fruition. All that the record shows as to the cited sales is that they were made to dealers who were receiving financial assistance of undefined amount and on undefined terms and conditions. Moreover, there is no evidence which of these loan commitments or what proportions of the totals were within the special financing category or were on ''unique'' terms and conditions when and where made even by the standards plaintiff argues here. A more meaningful insight into the extent to which the Credit Corporation's financing activities constituted ''the exercise of naked economic power,'' as plaintiff charges (Br., p. 23), lies in this unchallenged fact: during the three years pertinent to plaintiff's case—1960 through 1962—loan commitments (whether or not actually taken by the borrowers) aggregating as much as $250,000 were made to a total of only 43 Homes Division customers (including plaintiff) who were located in nine different states (178a-180a).

Summary of Argument

For the first time, plaintiff urges here that, contrary to the District Court's conclusion, plaintiff's case does not depend solely on the legality or illegality of the challenged tying arrangements. Before both courts below, however, all of plaintiff's claims were grounded on the contention that conditioning by the defendants of their financing upon the purchase of their prefabricated houses was an unlawful tying arrangement, constituting a *per se* violation of the Sherman Act. Whether standing alone or as the objective and effectuation of a conspiracy to restrain trade and to monopolize, the argued *per se* character of the tying arrangement was the crux of plaintiff's case and a prerequisite to all the claims asserted.

Plaintiff concedes that when defendants moved for summary judgment shortly before the trial discovery was complete, there had been four years of preparation, and the evidence was extensive and included all the material pertinent to plaintiff's case. Moreover, plaintiff argues that the evidence entitled plaintiff to a directed verdict on the liability issues. Plaintiff neither shows any material issue of fact to be in dispute nor questions the credibility of any witness or the probative force of any other evidence. In these circumstances and where *per se* violations of the antitrust laws requiring no proof of motive or intent are alleged, as here, summary judgment is appropriate.

Plaintiff argues that either because financing was not available at all from other sources or was offered only

on less favorable terms, defendants' financing was "unique" and therefore, on the authority of the *Loew's* decision,[24] supports the inference of "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." *Loew's,* however, reiterated prior holdings (based upon accommodation of the antitrust laws to the objectives of the patent and copyright laws) to the effect that "the requisite economic power is presumed when the [tying] product is patented or copyrighted." The opinion in *Loew's* does not define "uniqueness" in other circumstances, and it recognizes that in some cases even full-scale inquiry into the relevant market for the tying product and the seller's share of that market may be necessary although proof of monopoly power is not essential.

The tying case decisions of this Court demonstrate that, outside the patent and copyright areas, evidence of meaningful economic power over the tying product is a prerequisite to the application of the virtual *per se* rationale inasmuch as tie-ins are not inevitably anticompetitive. More specifically, the Court's decisions support the conclusion that where the tying element is offered on more favorable terms than elsewhere it can not be inferred without more that "sufficient economic power" over the tying product exists. See *FTC* v. *Sinclair Refining Co.,* 261 U.S. 463 (1923), where the factual context closely parallels that here, and *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 8 (1958), where weight was given to the fact that no claim was made that the tying element

24. *United States* v. *Loew's Inc.,* 371 U.S. 38 (1962).

"came any cheaper than if the restrictive clauses had been omitted."

Logic dictates that "uniqueness," in the sense of *Loew's,* should not be ascribed to a tying product simply because it is offered on more favorable terms. A buyer who agrees to take a tied product with a tying product offered on more favorable terms may do so because he considers the "package" the best business arrangement for him, not because the seller has economic power over the tying product. Indeed, the fact that the tying product is offered on more favorable terms may suggest that it lacks even competitive parity in its own market. Further, a tying product offered on more favorable terms may be nothing more than a "loss leader" promotional device.

Plaintiff's novel contentions that a seller's financing of his dealers constitutes a *per se* violation simply because it is offered on more favorable terms than available elsewhere would inhibit competition in the "tied product" (the seller's goods) and would adversely affect the viability of many small businesses buying from such sellers. Such financing, to the extent that it is on more favorable terms, amounts to a reduction in the price of the tied product and represents competition in the market for that product. As such a price reduction, the financing challenged is an integral element of the tied product, analytically precluding the existence of the two different products requisite to the *per se* category of tying violations.

Finally, drawing every reasonable inference in favor of plaintiff, the record fails to show that defendants' financing was "unique" or that a not insubstantial amount of commerce was affected.

ARGUMENT

I

Plaintiff's contention that its case does not turn upon finding a *per se* tying violation is an afterthought and the case was ripe for summary judgment.

A. Plaintiff's argument that defendants conspired to restrain trade and monopolize independent of the alleged *per se* tying violation is a new theory of its case not urged below.

Contrary to well-established principles, plaintiff argues before this Court a wholly new theory of its case never presented either to the District Court or the Court of Appeals.

Plaintiff urges that because the District Court concluded "that the case depended solely on the legality or illegality of the tying agreement"[25] the Court of Appeals should have "reversed out of hand on this point alone" (Br., p. 21). In thus contending that a finding of an unlawful tying agreement was not necessary to one aspect of its case, plaintiff declares that its complaint "specifically allege[s] a conspiracy and concert of action to use the financing power of the * * * Credit Corporation as a means of forcing dealers such as and including [plaintiff]

25. The District Court held: "It is these loan agreements which plaintiff claims are illegal tie-in contracts, violative of Sections 1 and 2 of the Sherman Act. The fact of conspiracy or lack of it, surrounding or related to the execution of these contracts, has no bearing on the matter at this point. If the contracts are illegal under the facts attendant thereto, then plaintiff has a cause of action and may then proceed to prove conspiracy." (Br., pp. 45-46)

to purchase the prefabricated houses of" the Homes Division.[26] (Br., p. 15).

Whether or not the complaint (18a-24a) alleges any antitrust violation wholly separate and apart from unlawful tying arrangements imposed by the defendants upon plaintiff and others, concededly modern rules require that pleadings be so construed as to do substantial justice. The courts below, however, were bound to decide the case upon plaintiff's own characterization of it.

Before the District Court, in support of its contentions that it was entitled to a directed verdict, plaintiff's sole tendered instruction on the issue of liability was that "the evidence presented in this case has established as a matter of law that the defendants * * * conspired to establish an unlawful tying agreement between the defendant Credit Corporation and the plaintiff* * *" (280a). In opposing defendants' summary judgment motion, plaintiff repeatedly described its case only as "a tie-in case."[27]

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26. Conspiracies and attempts to monopolize (*i.e.*, to acquire monopoly power—the power to control price and exclude competition) require proof of specific intent and the dangerous probability of achieving monopoly in the relevant market. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 626 (1953); *United States* v. *Griffith*, 334 U. S. 100, 105 (1948); *United States* v. *Jerrold Electronics Corp.*, 187 F.Supp. 545, 567 (E.D. Pa. 1960), *aff'd. per curiam*, 365 U. S. 567 (1961); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172 (1965); *Swift & Co.* v. *United States*, 196 U. S. 375, 396 (1905). Neither the complaint nor plaintiff's characterizations of the record satisfy all of these requisites notwithstanding its urging that defendants have violated Section 2 of the Sherman Act.

27. Plaintiff's Memorandum In Response To Defendants' Motion For Summary Judgment: "The [*Tampa Electric*] case, * * * cited by defendants is not a tie-in case as charged by the plaintiff in the present action. * * *" (p. 2) "Defendants cite numerous cases which

Before the Court of Appeals, plaintiff argued only that summary judgment for the defendants was improper "on the antitrust issues when the facts clearly establish an illegal conspiracy by the defendants which forced, through economic power and circumstances, an unlawful tying arrangement on plaintiff which the defendants then combined and conspired to enforce * * *" (CAB, p. 50). Plaintiff specified that its "claim is that the defendants combined and conspired to establish an illegal tie-in arrangement whereby the Credit Corporation would require as a condition to the giving of its financing that the company using the financing would have to purchase pre-fabricated home packages from the Homes Division" [28] (CAB, p. 51).

In sum, by plaintiff's own characterizations of its case before both courts below, unlawful tying arrangements, whether standing alone or as the objective and effectuation of a conspiracy to restrain trade and monopolize, were the crux of its claims and an essential pre-condition to establishing those claims. Indeed, notwithstanding its contention that the District Court committed reversible error in concluding that the case turns upon whether or

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they claim stand for the proposition that the agreements attacked in this case are not illegal tying agreements. However, they have failed to adequately analyze these decisions and many of the decisions are authorities relied upon by the plaintiff." (p. 2) "We thus have loan agreements which impose illegal tying arrangements on their face. We have two separate corporations * * * conspiring to create this and other illegal tying arrangements. * * * We have thus completely met the test established by the authorities to show a *per se* illegal tying arrangement." (p. 7) "The plaintiff can find no decided case where an illegal tying arrangement or conspiracy to require or establish an illegal tying arrangement has been decided on the question of *pari delicto*." (pp. 9-10)

28. The Appendix to this brief contains the entire antitrust argument from plaintiff's brief before the Court of Appeals.

not unlawful tying arrangements can be found, even here the plaintiff's own description of its cause supports the conclusion reached below.[29]

Other than in exceptional cases, this Court has consistently declared its refusal to hear questions or contentions never raised below and which are urged for the first time as an afterthought on review here. *Virtue* v. *Creamery Package Mfg. Co.*, 227 U.S. 8 (1913); *Duignan* v. *United States*, 274 U.S. 195 (1927); *Blair* v. *Oesterlein Machine Co.*, 275 U.S. 220 (1927).

B. Based upon all the circumstances and plaintiff's own view of its case, there was no error in granting summary judgment.

Plaintiff states that when it instituted this action, "Much discovery was had thereafter, principally by Petitioner, including interrogatories, numerous depositions and the production of numerous documents by [defendants]. All of the pertinent material to Petitioner's cause appears in the two volume appendix in the record before this Court and is quite extensive * * *. Summary judgment [was] first sought eleven days before trial,[30] and after four years of preparation" (Br., pp. 10, 14).

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29. "The underlying element of both charges [alleged violations of Sections 1 and 2 of the Sherman Act] involves loan agreements * * * which required [plaintiff] to build in its subdivision prefabricated houses manufactured and sold by the Homes Division of U. S. Steel as a condition to the loan of money for land acquisition and development. * * * The evidence establishes a conspiracy between U. S. Steel and U. S. Steel Homes Credit Corporation to establish this and many other illegal tie-in agreements through the use of such loans, for the purpose of increasing U. S. Steel's share of the prefabricated house package market. * * * Summary judgment procedures in antitrust cases involving charges of *per se* violations and conspiracy are and should be frowned upon and not allowed." (Br., pp. 12-13)

30. Plaintiff was ready for trial on the scheduled date (341a).

Comparison of plaintiff's brief and the record demonstrates that no material issue of fact is disputed, and plaintiff raises no question of witness credibility. Nor do defendants contest any reasonable inferences that can be drawn from the evidence, including those most favorable to plaintiff where alternative inferences are possible. Finally, as plaintiff argued before both the District Court (280a) and the Court of Appeals (CAB, pp. 88-89), it urges here "that if the evidence at the trial on the issues of liability [is] the same as is now in the record, then Petitioner would be entitled to a directed verdict on such issues, with only the question of damages to be resolved by a jury" (Br., p. 37).

The theory underlying summary judgment is substantially the same as that governing a directed verdict. 6 Moore, Federal Practice, ¶56.02[10], p. 2043; *cf. Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944). The essence of both is that there is no genuine issue of material fact to be resolved.

Plaintiff relies on *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). In *White Motor Co.* v. *United States*, 372 U.S. 253, 259 (1963), the Court pointed out that *Poller* held summary judgment inappropriate where "motive and intent play leading roles" but that in other circumstances "summary judgments have a place in the antitrust field, as elsewhere * * *." That same conclusion has been more recently reiterated in *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968), a case demonstrating that summary judgment may be appropriate even where a conspiracy among competitors

is alleged. Moreover, that case stands for the proposition that under the present Rule 56(e) of the Federal Rules of Civil Procedure summary judgment cannot be successfully opposed on speculation rather than the drawing of logical inferences from a showing of admissible facts to which the witnesses could competently testify.

Alleged *per se* violations of the antitrust laws, where no proof of motive or intent is required, are particularly appropriate subjects for summary judgment. In cases of alleged tying arrangements, summary judgment has been granted in favor of both plaintiffs and defendants. *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1 (1958); *International Salt Co.* v. *United States,* 332 U.S. 392 (1947); *Dehydrating Process Co.* v. *A. O. Smith Corp.,* 292 F.2d 653 (1st Cir.), *cert. denied,* 368 U.S. 931 (1961).

In these circumstances, it is submitted there was no error below in concluding that this case was appropriate for the grant of summary judgment.

II

Defendants' financing conditioned upon the purchase of their prefabricated houses was not a *per se* tying violation.

A. Plaintiff's contentions that a non-patented, non-copyrighted tying element, "unique" solely because offered on more favorable terms than available elsewhere, therefore evidences the requisite economic power to establish a *per se* violation find no support in this Court's decisions or in any logical analysis.

Plaintiff's unlawful tying arrangement contentions are appealingly simple:

(1) Defendants have admitted that the loan agreements at issue tied the purchase of house packages to the lending of money for land purchase and development (Br., pp. 16, 25).

(2) These loans, because of their "unusually favorable terms" (*i.e.*, "higher percentage loans in relation to equity at more advantageous rates") and their unavailability through "normal channels," were "unique not only to [plaintiff] but to * * * other customers" (Br., pp. 23-24, 30).

(3) *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 6 (1958) holds that tying agreements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected" (Br., p. 26).

(4) *United States* v. *Loew's Inc.*, 371 U.S. 38, 45 (1962) states that "Even absent a showing of market dominance [some power to control price and to exclude competition], the crucial economic power [over the tying product] may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes" (Br., p. 28).

(5) Therefore the tying arrangements here were "*per se* violations" (Br., p. 13).

With respect to the element of "sufficient economic power" over the tying product necessary to establish tying arrangements as a virtual *per se* violation, patently plaintiff's case turns on the contention that defendants' financing was "unique" within the meaning of the *Loew's* decision. Rational antitrust enforcement in the public interest requires avoiding the tyranny of labels, and *Loew's* neither fully defined the meaning of "unique" nor changed the pre-existing law on tie-ins. Rather, the Court, in the context of block-booking of copyrighted films, reiterated the holdings of prior cases[31] to the effect that "the requisite economic power is presumed when the [tying] product is patented or copyrighted" and explained the rationale (arising from the nature of the statutory grant of "monopoly") for this presumption.[32]

31. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947) and *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131 (1948).

32. 371 U. S. at 45-46. The presumption represents an intertwining of the antitrust law with the patent and copyright laws—an accommodation of the former to the latter's "hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products." The result is that where the tie is effected by a patent or copyright, any showing of even minimal ac-

Outside the area of patents and copyrights, the *Loew's* decision offers little insight as to what kind or degree of "uniqueness" will prove "sufficient economic power" over the tying product. Indeed, the Court's opinion makes it clear that, while market power in the sense of Section 2 of the Sherman Act (*i.e.*, monopoly—the power to control price or exclude competition) is not a prerequisite, "uniqueness" has not become the sole calculus since at least in some cases it will be necessary to inquire into the relevant market for the tying product and the seller's share of that market.[33] And since the decision in *Loew's*, this Court, stating that "tying arrangements * * * may fall in [the *per se*] category, though not necessarily so," has pointed to "the importance of the tying arrangement in its factual setting." *White Motor Co.* v. *United States*, 372 U.S. 253, 262-263 (1963).

Significantly, putting aside the tie-in cases involving patents or copyrights, there are only two opinions of this

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tual commercial leverage or economic power in the marketplace will be dispensed with, and if a "not insubstantial" amount of commerce is affected, the arrangement will be found unlawful. The antitrust laws will thus guard against any extension of the statutory limited "monpoly" privilege as jealously as do the patent and copyright laws (*e.g.*, the patent laws deny a patentee who uses his patent as a tie all relief against infringement).

33. "* * * [I]t should *seldom* be necessary in a tie-in case to embark upon a *full-scale* factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's share in that market." 371 U. S. at 45 (Emphasis added.) Moreover, the statement in the *Loew's* opinion that "the crucial economic power may be inferred from the tying product's desirability to consumers" suggests that the Court meant that some degree of market sucess in the tying product must be shown. A customer will seldom if ever buy a product he deems undesirable, so that if something less than a degree of market success were intended any purchase of the tying product, even by a single buyer in a minimal amount, would prove "sufficient economic power."

Court delineating what constitutes "sufficient economic power" over the tying product to come within the Sherman Act prohibition. In *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594 (1953), it was held that the defendant, with 40 percent of a three-newspaper advertising market, lacked a sufficient increment over the other two papers to occupy a "dominant" position.[34] In *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1 (1958), the tying product which was found to manifest "sufficient economic power" consisted of defendant's "extensive landholdings which it used as leverage to induce large numbers of purchasers and lessees to give it preference, to the exclusion of its competitors, in carrying goods or produce from the land * * *, [which] was strategically located * * * and was frequently essential to their business activities." Moreover, "this host of tying arrangements [was] itself compelling evidence of the defendant's great power * * * where * * * no other explanation [was] offered for the existence of these restraints" and the defendant's purpose "obviously was to fence out competitors, to stifle competition." [35]

Against this background and the following discussion, it is submitted that the tying arrangements challenged here

34. 345 U. S. at 611-612.

35. 356 U. S. at 7-8. In the only other case outside the patent and copyright areas to come before the Court, there was a *per curiam* affirmance of a finding that the innovator of the first successful community television antenna system, who sold approximately 75 percent of such systems in the country, had "sufficient economic power" to make its tying of the full system and of service contracts unlawful not at the inception of its business but only when those restraints were no longer necessary for its survival. *United States* v. *Jerrold Electronics Corp.,* 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd. per curiam,* 365 U. S. 567 (1961).

fail to come within any of the standards articulated by this Court as establishing violation of the Sherman Act and do not fit either the policy or rationale of the virtual *per se* rule applicable in appropriate tie-in cases.

While tying agreements, unlike exclusive dealing restrictions, have been deemed by this Court to "serve *hardly* any purpose beyond the suppression of competition,"[36] even under the narrower, more easily established standards of Section 3 of the Clayton Act, tie-ins have been recognized as not inevitably anticompetitive. Thus, in *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923), the Court approved the leasing of unpatented gasoline pumps on condition that only the lessor's gasoline be dispensed through them.

The defendant gasoline company in *Sinclair* had no market dominance in the tying products, which were readily available from other sources, but the defendant leased its pumps at nominal rates not representing reasonable returns upon investment and on terms more favorable than if the dealers had to buy them. The tied product was but one of many brands of gasoline, and no one of them was essential to the dealers' business. While the dealers were free to sell competing gasoline simultaneously from other pumps and to discontinue use of the defendant's pumps, the argued practical effect of the tie-in was to confine most dealers to handling only the defendant's gasoline. The Court noted, however, that the practice "appears to have promoted the public convenience by inducing many small

36. *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 305-306 (1949). (Emphasis added.)

dealers to enter the business and put gasoline on sale at the crossroads.''[37]

Clearly the facts of the *Sinclair* case illustrate that there are situations where a tying arrangement results not from market control or leverage over one product, even though it is made available on uniquely favorable terms, but rather because the arrangement serves a useful economic purpose and will not necessarily have an adverse effect upon competition in the market for the tied product. Equally important, *Sinclair*, even though involving unpatented machinery rather than financing as the tying element, is highly analogous to the arrangements at bar and demonstrates that a *per se* approach is no more appropriate on the facts here.

In *Sinclair*, the tying pumps were readily available on the market, but were offered by defendant on unique terms more favorable to the dealers than those available from other sources. Here plaintiff admits that financing was generally available through ''normal channels'' and others but claims at most only that defendants' financing was offered on more favorable terms than it could obtain elsewhere.

In *Sinclair*, the pump leases left the dealers free to handle competing gasoline and to take pumps from other sources, whether or not conditioned upon gasoline purchases. The only limitation was that the dealers must use the defendant's gasoline if they used its pumps, and the dealers were free to terminate even that limitation by discontinuing use of the pumps. Here the financing left the

37. 261 U. S. at 475.

plaintiff free to deal in competitive houses and to take financing from other sources, whether or not conditioned upon house purchases. The only limitation was that plaintiff must buy defendants' houses for specified lots if it used their financing, but plaintiff was free wholly to avoid or to terminate even that limitation by not using defendants' financing or by repaying any advances taken.

In *Sinclair*, the dealers agreed to the tying arrangement not because they had to obtain the tying product from the defendant as a matter of economic necessity (other pumps were readily available even though on less favorable terms) but because the arrangement was the most advantageous method of securing both the pumps and the gasoline. Competition in the retail gasoline trade was enhanced because pump leases facilitated new dealer entries into the business. The circumstances, therefore, were unlike those in *Northern Pacific*, where defendant's extensive holdings of strategically located land were "frequently essential to [the purchasers' and lessees'] business activities."[38] Similarly, the tied gasoline in *Sinclair* was but one of comparable competing brands, no one of which was essential to the dealers' business, so that the situation was not one where economic coercion by means of the tying product could be inferred from the mere existence of the

38. 356 U. S. at 7. Similarly, *Associated Press* v. *Taft-Ingalls Corp.*, 340 F.2d 753 (6th Cir.), *cert. denied*, 382 U. S. 820 (1965), upon which plaintiff relies, is distinguishable. There the Court of Appeals "first emphasize[d the defendant's] position of dominance in the field of news," found that its news dispatches were "comparable to a copyright * * * [and] possess a uniqueness 'to suggest comparison with a monopoly by patent,' " and then concluded that one wire service included in a mandatory package was "indispensable" to the plaintiff. 340 F.2d at 766-768.

tying arrangement absent a showing of economic power in the tying product.[39]

Here plaintiff contends that its evidence shows that the defendants have used their "economic power in the form of loans not available elsewhere at all or under the terms offered to force the purchase" of defendants' homes and that the terms of the loans were so "economically attractive" that plaintiff "was compelled to accept the tying arrangement to obtain the loans" (Br., pp. 12, 21). If plaintiff's first conclusion (that loans were not available to it at all) is accepted, then there was no restraint of commerce since defendants' financing could not have foreclosed any competitor of Homes Division from supplying the plaintiff. If plaintiff's alternative conclusion (that loans on equally favorable terms were unavailable to it) is accepted, then plaintiff has not been coerced by economic necessity to preserve an existing business but rather its entry into the housing development business has been facilitated by the most advantageous means for obtaining both the financing it needed and houses to which it had no objection at the time the arrangements were negotiated.[40]

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39. "* * * [T]here may be instances where economic coercion by a vendor may be inferred, without any direct showing of market dominance, from the mere existence of the tying arrangements themselves, as where the vendee is apt to suffer economic detriment from the tying clause because precluded from purchasing a tied product at better terms or of a better quality elsewhere." *Northern Pacific*, 356 U. S. at 16-17 (Dissenting opinion).

40. Reference to this fact does not represent any *pari delicto* argument by the defendants. The fact is germane to a proper analysis of whether the Credit Corporation's financing of the plaintiff evidenced "sufficient economic power" to constitute the kind of tying element requisite to a *per se* violation. While defendants attempted to interpose the affirmative defense of *pari delicto* below, it was rejected and not even considered by the District Court (320a, 927a). Consequently, even if plaintiff's view of what this Court decided in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968), were correct, that decision has no applicability here.

Even apart from the fact that defendants' financing enabled plaintiff to start a new business, many considerations militate against adopting a *per se* approach simply on the ground that the tying product is unique because offered on more favorable terms than available elsewhere. Whether a buyer pays a higher price for a tying product by itself or agrees also to purchase a tied product as the condition to paying a lower price for the tying product may not depend upon the seller's having economic power over the tying product at all. The arrangement may simply represent what the buyer considers the best business terms for him.

Indeed, where a tying product is unique because it is offered at a lower price or on more favorable terms than other such products, it is anomalous to urge that, without more, that fact supports an inference of "sufficient economic power" over the tying product (a conclusion which may well have shaped the Court's reasoning and the result reached in *Sinclair*). The fact that the tying product must be offered on more favorable terms may suggest that it lacks even competitive parity in its own market. If it has competitive parity, even if the tied product is worthless, then the tying product should command at least the prevailing price in its market unless taking the tied product places some significant burden upon the buyer.

This Court in *Northern Pacific* appears to have recognized that offering the tying product on more favorable terms may in fact imply the absence of "sufficient economic power." Thus the Court pointed to the fact that "the defendant makes no claim that [the tying land] came any

cheaper than if the restrictive clauses had been omitted."[41] Similarly, in *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir.), *cert. denied*, 314 U. S. 618 (1941), the Court of Appeals, in finding that the defendants had employed the dominance of their GM car sales and franchises to coerce dealers into using defendants' financing, carefully rejected the contention that the financing had been intended to promote the sale of defendants' cars (*e.g.*, to avoid exorbitant charges by other financing sources). The court held that the jury could reject the argument as far-fetched since the defendants' financing was not *sui generis* or better than competitors'.[42]

Moreover, a tying product unique because of the more favorable terms on which it is offered may be nothing more than a "loss leader" promotional device. For example, the price of the tied product is for all effects and purposes "reduced" when the tying product is sold at an unremunerative level. By selling the tying product in such circumstances upon the condition that the tied product will be used with it, the seller hopes to obtain new customers and increased sales to make up for his losses on the tying product. In essence, he may at best obtain a requirements contract which, if the buyer is free to return the tying product, as the plaintiff was here, is subject to termination at any time.

Defendants recognize that the tying case decisions of this Court to date may not have exhausted the catalog of indicia of "sufficient economic power in the tying product to appreciably restrain commerce in the tied product."

41. 356 U. S. at 8.

42. 121 F.2d at 384, 412.

Those decisions do indicate, however, that outside the patent and copyright areas some evidence of meaningful economic power is essential, whether it be evidence of a degree of market dominance or success, necessity of the tying product to buyers, a burden to buyers in accepting the tied product sufficient to imply power in the tying product, or other proof.

B. Financing by a seller in connection with the sale of his goods is price competition in those goods and not a *per se* tying violation.

While the factors discussed above demonstrate with respect to *any* tying product why a *per se* disposition is improper just because that product is unique only in consequence of being offered on more favorable terms than otherwise available, the special nature of the tying product here—financing by a seller solely in connection with the sale of his own goods—also requires consideration.

Although plaintiff urges that it is not "attacking the use of financing or credit as it is normally used in the economy" (Br., p. 16), the implications of sustaining plaintiff's claims are no less far-reaching.

Sellers who finance either the purchase of their goods or, more broadly, the buyer's business in dealing in those goods inevitably, as here, condition the financing upon the purchase of their goods. Even the Government, in "selling" public programs like school integration, insists that those programs be implemented if its financing is accepted. In the private sector of the economy, such financing conditioned upon the purchase of the lending seller's

goods is widespread today, and it has promoted competition and the advent of small, independent businesses, not just in connection with the burgeoning franchise phenomenon but elsewhere as well. In essence, plaintiff's claim is that if such financing is more favorable than the buyer could obtain elsewhere, then it is "unique" and, unless the volume of goods affected is *de minimis,* constitutes a *per se* violation. This claim will not withstand analysis, either in law or logic.

Prior cases involving challenges to dealer financing by suppliers to achieve sale of their products appear to be few. In *Hastings Mfg. Co. v. FTC,* 153 F.2d 253 (6th Cir. 1946), loans to dealers as part of an inducement not merely to handle the seller's line of goods but to discontinue handling competitive products were found to be an unfair method of competition under Section 5 of the Federal Trade Commission Act only where part of an aggressive anti-competitive program which resulted in the respondent's growth from sixth to second largest seller in its industry. The Court of Appeals, however, noted, "It is not illegal for a manufacturer to finance his retail outlets. * * *"[43] In the so-called "Ice Cream Cases," the Commission upheld dismissal of complaints based in part upon dealer financing, conditioned upon exclusive dealing, for failure to prove the requisite competitive effect.[44] Thus, in these cases applying a statute with far less stringent standards for establishing violation than those of the Sherman Act and involving exclusive dealing by numbers of dealers, with total foreclosure of competitors from access to their business, there

43. 153 F.2d at 257.

44. *Carnation Company, et al.,* 60 F.T.C. 1274 (1962).

was no suggestion that conditioning dealer financing upon the non-exclusive purchase of the supplier's products was unlawful.

Turning to financing absent any exclusive dealing requirement, it is manifest that every sale on credit involves a tie-in. The seller in effect offers to finance the buyer if he will agree to purchase the seller's goods. The financing may be of greater or lesser degree—2 percent off for payment in ten days, six-month installment terms with or without interest and carrying charges, and so on. If the seller does not furnish credit, the buyer may obtain financing from a third party.

Every sale on credit is in effect a reduction of the price of the goods to the extent to which the cost to the seller of forgoing receipt of cash and use of the funds at the time of the sale is not added to the sale price. Where the seller offers credit or financing on more favorable terms than available elsewhere, he is in effect further reducing the price of his goods. If the seller's financing is more favorable, the buyer can purchase more of the seller's goods at the same cost to the buyer or the same volume at a lower unit cost. The extent of the additional reduction in price accepted by the seller is equivalent to what he forgoes by offering more favorable terms. Thus credit and financing are in fact price competition in the goods sold. Sellers fashion their credit and financing to assure that they are competitive in the sale of their goods. Indeed, the record here demonstrates that defendants did just that.

That the seller's financing may extend to aspects of the buyer's business other than just the purchase of the seller's

goods involves no different principle. Such financing is like a variety of other services offered in the competitive sale of the goods. For example, sellers furnish to their buyers technical advice, sales assistance and cooperative advertising and promotional services which promote not only the seller's goods but the overall business of the buyers as well. All of these services, in purpose and effect, amount, wholly or in part, to reductions in the price of the seller's goods. The fact, therefore, that the financing here enabled plaintiff not only to buy the defendants' houses but also to buy and develop the lots on which the houses would be placed and to construct them reflects no less a reduction in the price of the houses.

At least to the extent that defendants' financing was on more favorable terms than available elsewhere, it was an integral element of the price of the houses themselves. It is axiomatic that the *per se* category of tying violations requires two different products. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953). For example, delivered automobiles are one product, not automobiles and transportation. *Cf. Crawford Transport Co.* v. *Chrysler Corp.*, 235 F.Supp. 751 (E.D. Ky. 1962), *aff'd*, 338 F.2d 934 (6th Cir. 1964), *cert. denied*, 380 U. S. 954 (1965).

That the financing and houses sold to plaintiff are not "different products" for purposes of finding any *per se* tying violation is re-enforced by the fact that they are complementary and in fixed proportions to each other. Unlike *International Salt* and *Northern Pacific*, plaintiff's use of the financing did not require it to take defendants' houses on an open-ended requirements basis over the course of

time. The financing was geared directly to the purchase and development of a specified number of lots, for each of which plaintiff was to buy one of defendants' houses so long as it kept defendants' funds.

C. There is no evidence from which it can be inferred that the challenged financing was "unique" or that a not insubstantial amount of commerce in the tied product was affected.

Even apart from the fact that financing by a seller on more favorable terms than available elsewhere can not be fitted into the rationale of the virtual *per se* tying violation, defendants contend that plaintiff has failed to show any competent evidence from which it might be inferred that the challenged financing by Credit Corporation was "unique" (thereby establishing "sufficient economic power" in the tying element) or that a "not insubstantial amount of commerce in the tied product" was affected.

Without belaboring the evidence of record earlier described in the statement of the case, defendants point to Mr. Fortner's affidavit claiming that "to his knowledge" no other 100% land financing was available to plaintiff. That evidence is incompetent since no basis is stated for his knowledge and because his characterization of "uniqueness" is purely a legal conclusion without any comparative definition of how the terms and conditions of financing available elsewhere differed. Moreover, Mr. Fortner's affidavit leaves open serious questions as to whether financing on any other terms was available to plaintiff at all (see pp. 14-15, 27-28, *supra*).

Similarly, Mr. Horn's affidavit fails to define in any way the extent to which the 100% land financing negotiated by plaintiff differed from loans available elsewhere. And while Mr. Horn's background arguably qualifies him to offer an expert opinion, the sole thrust of his statement is that prior to 1963 his mortgage company and other such organizations and lending institutions in Louisville did not offer 100% land financing. Even any expertise possessed by Mr. Horn, however, does not make his legal conclusion of "uniqueness" competent (see pp. 16-18, 27-28, *supra*).

For the reasons analyzed at pp. 26-29, *supra*, there is a failure to show that financing extended to other Homes Division dealers was "unique" or that house sales tied to any such financing of other dealers amounted to a "not insubstantial amount of commerce."

Finally, even if, *arguendo*, the financing of plaintiff was "unique," the amount of commerce involved is *de minimis*. In 1961, the year of its greatest purchases, plaintiff bought only 55 houses from the Homes Division at a price of $189,002. In *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), upon which plaintiff relies, the annual volume of business in the tied product was $500,000 in 1944 price-controlled dollars rather than the inflation-depreciated dollars of 1961. Moreover, to the extent that plaintiff does not claim that it would have bought (or have been able to buy) competing houses without Credit Corporation's financing,[45] there is no showing from which it can be inferred that there was any restraint of commerce in the tied product market.

45. Mr. Fortner's affidavit states only that "the plaintiff would not have purchased said home packages [from the Homes Division] but for the financial assistance offered by the Credit Corporation" (290a).

Conclusion

For all of the above reasons, the judgment below should be affirmed.

Respectfully submitted,

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II.

ARGUMENT

1. Did the Trial Court improperly grant the Defendants' Motion for Summary Judgment on the anti-trust issues when the facts clearly establish an illegal conspiracy by the Defendants which forced, through economic power and circumstances, an unlawful tying arrangement on Plaintiff which the Defendants then combined and conspired to enforce which was in violation of Sections 1 and 2 of the Sherman Act?

The District Court answered "No."

Plaintiff-Appellant answers "Yes."

This suit was filed charging violations of Sections 1 and 2 of the Sherman Act which provide in pertinent part:

> "§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.
>
> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal:"
>
> "§2. Monopolizing trade a misdemeanor; penalty.
>
> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with a foreign nations, shall be deemed guilty of a misdemeanor, and, or conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(51) The Plaintiff's claim is that the Defendants combined and conspired to establish an illegal tie-in arrangement whereby the Credit Corporation would require as a condition to the giving of its financing that the company using the financing would have to purchase prefabricated home packages from the Homes Division. Plaintiff submits that its evidence establishes that the combination and conspiracy existed and functioned as to Plaintiff and virtually all other borrowers from the Credit Corporation.

The Loan Agreements which the Credit Corporation required the Plaintiff to execute clearly require as a condition thereof that Plaintiff purchase and build the Homes Division packages.

The evidence establishes that the Homes Division personnel first approached Mr. Fortner. He was not initially particularly interested in their presentation but financing was mentioned and the Credit Corporation people then approached Mr. Fortner with offers of financing. These offers eventually got to the point that they were so unusual and unique in their terms as far as Plaintiff was concerned that Plaintiff agreed to purchase the Homes Division homes as a condition of the financing. The homes would not have been purchased but for the unusual and unique financial assistance offered (Fortner Affidavit, 290a).

The 100% loan for land development and acquisition and construction was certainly not available to Plaintiff elsewhere in 1960 and 1961, as both Mr. Fortner and Mr. Horn have testified (290a, 294a and 295a).

(52) An analysis of the cases pertaining to illegal tying arrangements is necessary to establish the basis for Plaintitiff's case. The first case of importance is the decision by the United States Supreme Court in *Interna-*

tional Salt Company v. *United States*, 332 U. S. 392, 92 L. Ed. 20. International Salt Company leased machinery for processing salt to some 900 customers in the year in question. Each of the 900 leases contained a condition which required the lessee to purchase salt consumed in the leased machine from International Salt. The provision was not absolute since the lessee could purchase salt from some other company if International Salt chose not to meet the price. International Salt's sale of salt during the year in question amounted to $500,000.00. The Supreme Court held the leases to be illegal tying agreements which were *per se* violations of Section of the Sherman Act. The argument was made in that case that evidence should have been heard on the question as to whether the restraint was unreasonable under the Sherman Act. The Supreme Court held that it is unreasonable, *per se*, to foreclose competitors from any substantial market. The Court held that the volume of business affected by the leases was not insignificant nor insubstantial. The Supreme Court also held that the provisions which allowed the lessee, to purchase salt of equal grade from competitors if offered at a lower price did *not* avoid the stifling effect of the agreement on competition. The Court then says that the mere fact of this tying clause had not always been insisted upon did not justify its general use. It (53) should be noted that the United States, not the defendant, was given a Summary Judgment in this case.

The next significant decision in the tying field is that of *Northern Pacific Railway Company* v. *United States*, 356 U. S. 1, 2 L. Ed. 2d 545. This case involved preferential routing clauses in deeds and leases from the Defendant to purchasers and lessors. This case sets forth the basic elements necessary for an illegal tying arrangement and the fact that they are *per se* violations of Section 1 of the Sherman Act (2 L. Ed 2d 549-550):

"However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraining has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210, 84 L. Ed. 1129, 1161, 60 S. Ct. 811; division of markets, United States v. Addyston Pipe & Steel (54) Co. CA 6 Tenn.), 85 F. 271, 46 LRA 122, aff'd 175 U. S. 211, 44 L. Ed. 136, 20 S. Ct. 96; group boycotts, Fashion Originators' Guild v. Federal Trade Com., 312 U. S. 457, 85 L. Ed. 949, 61 S. Ct. 703; and tying arrangements, International Salt Co. v. United States, 332 U. S. 392, 92 L. Ed. 20, 68 S. Ct. 12.

"For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the

tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' Standard Oil Co. v. United States, 337 U. S. 293, 305, 306, 93 L. Ed. 1371, 1382, 69 S. Ct. 1051. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 606, 97 L. Ed. 1277, 1288, 73 S. Ct. 872. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not substantial' amount of interstate commerce is affected. International (55) Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12, Cf. United States v. Paramount Pictures, Inc., 334 U. S. 131, 156-159, 92 L. Ed. 1260, 1291-1293, 68 S. Ct. 941.'"

The Supreme Court then gives a very pointed discussion of the *International Salt* case which is very significant in terms of the present appeal (2 L. Ed. 2d 552):

"In our view International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12, which has been unqualifiedly approved by subsequent decisions, is ample authority for affirming the judgment below. In that case the defendant refused to lease its salt-dispensing machines unless the lessee also agreed to purchase all the salt it used in the machines from

the defendant. It was established that the defendant had made about 900 leases under such conditions and that in the year in question it had sold about $500,000 worth of salt for use in the leased machines. On that basis we affirmed unanimously a summary judgment finding the defendant guilty of violating §1 of the Sherman Act. The Court ruled that it was 'unreasonable, per se, to foreclose competitors from any substantial market' by tying arrangements. As we later analyzed the decision, 'it was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition.' (56) Standard Oil Co. v. United States, 337 U. S. 293, 305, 93 L. Ed. 1371, 1381, 69 S. Ct. 1051.

"The defendant attempts to evade the force of International Salt on the ground that the tying product there was patented while here it is not. But we do not believe this distinction has, or should have, any significance. In arriving at its decision in International Salt the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangement unlawful *despite* the fact that the tying item was patented, not because of it. 'By contracting to close this market for sale against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws.' 332 U. S., at 396. Nor have subsequent cases confined the rule of per se unreasonableness laid down in International Salt to situations involving patents. Cf. United States v.

Griffith, 334 U. S. 100, 92 L. Ed. 1236, 68 S. Ct. 941; United States v. Paramount Pictures, Inc., 334 U. S. 131, 156, 92 L. Ed. 1260, 1291, 68 S. Ct. 915; Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 79 L. Ed. 1277, 73 S. Ct. 872."

The law on illegal tying arrangements has been even further explained in *United States* v. *Lowe's Inc.*, 371 U. S. 38, 9 L. Ed. 11. This case is of great significance since it holds that the crucial economic power over the tying product described in the *Northern Pacific* case may be inferred from the tying products' desirability to the consumer or from some uniqueness of its (57) attributes. In that case Lowe's tied the lease of inferior films to preferred films. The opinion recites:

> "Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

On that same page, footnote 4 states in pertinent part:

> "Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a domination of market power in the sense of Section 2 of the Sherman Act, it should seldom be necessary in a tie-in case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market."

Appendix

This Sixth Circuit Court of Appeals had in 1965 occasion to thoroughly explore the concept of tying arrangements in *Associated Press* v. *Taft-Ingalls Corporation*, 340 F. 2d 753, cert. denied 382 U. S. 320. This case involved a provision of the by-laws of the Associated Press, by which the predecessor of Taft-Ingalls had agreed to abide, which required subscribers to take and pay for certain wire services. There was a two year cancellation clause. When Taft-Ingalls bought the newspaper in question it wished to take only (58) one of the wire services and tried to arrange with the Associated Press to just take the one it desired. The Associated Press refused to allow this and insisted upon enforcing the contract as it stood. Taft-Ingalls promptly cancelled the service and the Associated Press sued for two years' fees for the services. Taft-Ingalls defended on the ground that this was an illegal tying agreement under Sherman Act Section 1.

This Court held this to be an illegal tying agreement. It found that the desired service was unique as far as Taft-Ingalls was concerned and was the tying "product." The uniqueness to Taft-Ingalls gave the Associated Press sufficient economic power over the trying "product" to impose the prohibited restrictions. There was found to be sufficient evidence of the amount of interstate commerce restrained to meet the remaining test that a not insubstantial amount of interstate commerce was involved. This Court sustained the defense of illegality. Since Taft-Ingalls' proof as to damages on its counterclaim alleging violation of the antitrust laws was speculative, the Court directed that that claim be dismissed for that reason.

The above cases thus require the following elements:

1. A tying arrangement.

2. Sufficient economic power over the tying product.

3. To impose an appreciable restraint on free competition in the tied product affecting a not insubstantial amount of interstate commerce..

4. Evidence of actual harm to competition or the extent of such harm is not required.

(59) There is overwhelming evidence in the record on all four elements listed above in favor of the Plaintiff.

That the tying arrangement existed can be found in the Loan Agreements themselves (24a through 37a), the Defendants' Answer (58a) the Credit Corporation's Answers to Interrogatories (166a through 168a) and from the mouths of their own officers (871a through 873a).

That the type of 100% financing offered by the Credit Corporation was unusual and unique in the Jefferson County, Kentucky area and to the Plaintiff in particular can be found in the Affidavits of A. B. Fortner (290a) and Edwin Horn (294a and 295a), and this evidence is undisputed. As a matter of fact William H. Lang, President of the Credit Corporation, and Richard Dyas, Vice-President of the Credit Corporation, has admitted that their financing was given under circumstances where ordinary financing was not available (832a and 857a).

The tying "product" in this case is the loan of money under unusual and unique *terms,* not simply money as such. The terms under which the loans were offered gave the Credit Corporation the leverage it needed to force the purchase of the home packages. It is significant that 68% of the Homes Division's sales in 1960 involved loans from the Credit Corporation, 70% in 1961 and 75% in 1962. It is also most significant that all but a few of the loans made by Credit Corporation during those years involved Loan Agreements with the tying clause contained therein.

(60) On a comparative basis for 1960, 1961, and 1962, we find that loans of the Credit Corporation generated sales of Homes Division at the above percentages as follows:

Year	*Credit Corporation Loans*	*Homes Division Sales*
1960	$22,625,805.00	$3,971,217.76
1961	19,342,612.00	2,823,383.50
1962 (Through Sept.)	19,283,544.00	2,289,819.00

The loans exceeded sales by more than five times in 1960, and more than six times in 1961 and 1962. This is clearly the exercise of naked economic power generated by the vast wealth of United States Steel Corporation.

But the Defendants did not stop with the original promulgation of the Loan Agreements on their unusual and unique basis. When they were told that the tied product, the homes, were defective and that the reputation of Plaintiff's subdivision was rapidly going downhill and that Plaintiff had to be relieved of the restrictive tying clause, Plaintiff was told by Credit Corporation that it had to build the Homes Division houses on its subdivision or else. Plaintiff attempted to obtain relief from this restriction provision from about November, 1961 until May, 1962, while explaining to the Credit Corporation that it could pay off the loans if conventional or other homes could be built. The President of the Credit Corporation has testified that they intended to enforce the tying clause (840a). Plaintiff was repeatedly rebuffed even though the evidence shows overwhelming merit in Plaintiff's position (61) concerning the homes. There is a strong parallel here to

the *Associated Press* case, *supra,* where the Associated Press insisted on Taft-Ingall's taking all the wire services.

The repeated rebuffs are not surprising once the evidence is analyzed. As a result of the conspiracy between the officers of the Credit Corporation and the Homes Division, as demonstrated by the correspondence, memoranda, and their actions, the Credit Corporation became a tool of the Homes Division and it acts, and acted, accordingly. The Defendants anticipated a takeover of Plaintiff's property even before the first Loan Agreement was signed. The Credit Corporation carried on the program authorized by the Finance Committee of United States Steel of generating sales for Homes Division, there can be no doubt of that. Seventy house packages were sold to Plaintiff for at least a total of $210,000.00. The 55 house packages purchased by Plaintiff in 1961, at an average of $3,000.00 each which is the price for the lowest priced model, amounted to $165,000.00, or about 4% of Homes Division's sales for that year. It had been anticipated by Credit Corporation and Homes Division that the loans to Plaintiff would generate sales of 220 house packages in 1961 and 1962.

That competition was foreclosed by the tying arrangement here cannot really be disputed from the record. Not only was competition deliberately foreclosed by the Credit Corporation from the Plaintiff's subdivision, it was foreclosed from substantial business in the states in which the Credit Corporation did business (62) by the loans made in all of those states which resulted in $4,000,000.00 of sales in 1960, $2,800,000.00 in 1961 and $2,300,000.00 in 1962. Contrast this with the $500,000.00 of competition foreclosed in the sales of salt in the *International Salt Company* case, *supra.* This $500,000.00 was held to be a not insubstantial amount of interstate commerce. The Defendants had effectively foreclosed from competition by their agreements and

conduct with Plaintiff about 220 locations for homes at $3,000.00 per house package, or $660,000.00 worth of interstate commerce.

Whether the Defendants be treated as one entity or two under the above facts would not matter as could be seen from the above cases. The fact that two separate corporate entities do exist make this even a stronger case, however.

Section 1 of the Sherman Act prohibits all contracts, combinations and conspiracies in restraint of trade or commerce. The Loan Agreements themselves are such contracts. The Defendants have combined and conspired to have such contracts entered into by Plaintiff and others. The accepted definition of conspiracy under the antitrust laws is:

> "A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means," *U. S.* v. *Addyston Pipe and Steel Company,* 85 F. 271 (Sixth Circuit, 1898)."

The Seventh Circuit Court of Appeals in *United Sates* v. *General Motors Corporation,* 121 F. 2d 376, (63) Cert. denied 314 U. S. 618, has specifically held that General Motors atempts to have its dealers exclusively use General Motors Acceptance Corporation to provide the financing for the dealers wholesale purchases and the dealer's customer's purchases of new and used cars by conditioning such use in the awarding of dealer franchises and by other coercive acts such as short term contracts constituted a conspiracy violative of the Sherman Act (p. 402). The Court also holds that non-competitors can conspire to achieve an unlawful situation and then holds that General Motors and GMAC could not enjoy the benefits of separate

corporate entity and escape the consequences of an illegal combination in restraint of trade (p. 404).

In another case, *Kiefer-Stewart* v. *Joseph Seagram Company,* 340 U. S. 211 (1950), which involved Seagram Distillery and Calvert Distillery, mutually owned, the Supreme Court held that it was illegal for these separate corporate entities to conspire to maintain maximum resale prices. See also *United States* v. *Yellow Cab Company,* 332 U. S. 218.

As was found in the *General Motors* case, *supra,* financing can be a tied "product" under the Sherman Act. That is can be a tying "product" under the Sherman Act will be found in *Trans-World Airlines, Inc.* v. *Hughes,* 332 F. 2d 602 (1964), which involved allegations in the pleadings that the defendant, Hughes Tool Company, had conditioned its financing to T. W. A. on T. W. A. only purchasing its airplanes from Hughes. The Second Circuit Court of Appeals held that this allegation *on its face* charged an illegal tying arrangement (64) under the antitrust laws (p. 611). The Supreme Court initially granted certiorari and the case was extensively briefed and argued. The Supreme Court then dismissed the Writ of Certiorari as having been improvidently granted (380 U. S. 248, 249), thus leaving the Second Circuit opinion as the law.

The Complaint and Amended Complaint in this case also charge the Defendants with violation of Section 2 of the Sherman Act in that they combined or conspired to monopolize a part of the trade or commerce among the several states. The conspiracy to monopolize under Section 2 requires a mere showing of intent to monopolize a part of trade or commerce, but "monopoly power" does not have to be established. It is sufficient if some appreciable part of interstate commerce is the subject of the conspiracy. *United States* v. *Consolidated Laundries Corpora-*

tion, 291 F. 2d 563 (1961), at page 573. The dollar volume of commerce involved in that case was $523,168.00 (p. 572) which the Court held was sufficient, citing the *International Salt* case, *supra*.

It has been held that proof of a conspiracy to monopolize may be established without showing that the conspirators acquired power to carry out the object of the conspiracy. *American Tobacco Co.* v. *U. S.*, 328 U. S. 781, and *U. S.* v. *Griffith*, 334 U. S. 100.

The obvious purpose and intent of the Defendants in this case was to obtain as large a share of the prefabricated home market of Jefferson County, Kentucky and of the entire market area serviced by the Defendants. Their combination and conspiracy which (65) used unlawful means to attain this end, including coercive acts against the Plaintiff to maintain the position and effectuate their purpose, clearly had as its ultimate goal the obtention of as large a market share as possible with the accompanying power to control prices and exclude competitors. They were already exercising the power to foreclose or exclude competitors by use of their unlawful tying agreements.

Plaintiff submits that it has established overwhelming evidence of a violation of Section 1 of the Sherman Act and that it has certainly submitted sufficient evidence to go to a jury on the charge of conspiracy to monopolize.

Let us now turn to the evidence and law relied upon by the Defendants. As a preface it should be pointed out that the Memorandum Opinion (309a through 322a) of the District Court insofar as it pertains to the antitrust claims is identical with the "Findings of Fact and Conclusion of Law" tendered by Defendants (297a through 309a).

It was a shock to Plaintiff to see that the District Court had adopted the document tendered by Defendants with its reliance solely on the facts and law relied upon by Defendants and which virtually ignores the Plaintiff's theory of the case and the applicable law.

Appendix

A reading of the Memorandum Opinion would give one the impression that the District Court is being rather strict with the Plaintiff as a result of the citation of statutes in the Complaint. The Court was not critical of Plaintiff as the initial oral argument on the Motion for Summary Judgment after counsel had explained (66) the intended meaning of paragraph 1 of the Complaint. In looking at paragraph 1 (18a), we find that it and the two succeeding paragraphs are the jurisdiction and venue paragraphs. Co-counsel for the Plaintiff was formerly with the Antitrust Division of the Department of Justice and attempted in the Complaint to follow the format generally used by the Department of Justice. The Complaint invokes the jurisdiction of the Federal Courts under Sections 4 and 16 of the Clayton Act. The citation of Section 4 of the Clayton Act is 15 U. S. Code, Sec. 15 (886a), but it was merely cited incorrectly as a result of a typographical error as 15 U. S. Code, Sec. 14 in the Complaint. Section 4 of the Clayton Act is the section giving a private litigant the right to sue for treble damages. Section 16, 15 U. S. Code, Sec. 26 (886a and 887a) gives a private litigant the right to seek injunctive relief.

Paragraph 1 of the Complaint then specifically indicates that the violations of the antitrust laws charged are under Sections 1 and 2 of the Sherman Act. This is quite clear under the "Offenses Charged" portion of the Complaint beginning with paragraph 12 and continuing through paragraph 17 (21a through 23a).

The reason that a charge was not also brought under Section 3 of the Clayton Act is that it speaks in terms of goods, wares or commodities which might well not be applicable to financing as a tying entity.

Plaintiff has always claimed damages and sought injunctive relief on the basis of violation of Sections 1 and 2 of the Sherman Act.

(67) The Defendants conceded the tying condition in the Loan Agreements and the Court has so found. Whether Plaintiff was or was not a dormant corporation with an existing loss when the first Loan Agreement was signed merely adds to Plaintiff's case since it makes it even more obvious that 100% financing was most unusual, unique and attractive to Plaintiff (310a).

The Court finds as a fact that the sole underlying function of the Credit Corporation is to enable its co-defendant, United States Steel Corporation, to compete with others (311a). The Plaintiff's point in this lawsuit is that the Credit Corporation has conspired with the Homes Division to enable Homes Division to compete in an improper manner by *foreclosing* competition by use of the tying arrangement. Whether competitors are also operating in an equally illegal manner does not place the stamp of condonation or approval on the Defendants. As a matter of fact, the record shows that the Credit Corporation in the liberality of its financing went far beyond competitors in the terms of its loans (377a) and its Vice-President did not even know what terms its competitors were offering (859a). The fact is that Credit Corporation was being used as a tool to generate Homes Division sales regardless of cost.

The Court makes much of Plaintiff's tendered instructions (280a). It will be noted that paragraph 1 of those tendered instructions succinctly gives Plaintiff a directed verdict on a finding of a conspiracy as a matter of law which required Plaintiff to purchase the Homes Division homes in violation of Sections 1 and 2 (68) of the Sherman Act. It has consistently been Plaintiff's position that the evidence does and would show such a conspiracy and that Plaintiff at a trial would be entitled to a directed verdict on the liability question as a matter of law. The

Plaintiff's instructions, therefore, set forth that theory. The coercive conduct of the Defendants following the execution of the Loan Agreements is a part of the overall conspiracy.

It will be noted that the Court indicates that ample funds were available in Louisville, Kentucky, for lending and that Credit Corporation had no "monopoly" on money. This carefully ignores the Affidavits of A. B. Fortner and Edwin Horn which indicate that it is not the general availability of money which is important here but the terms under which that money is available which is significant. One of the chief money lenders in Louisville, Edwin Horn, President of Louisville Mortgage Service Company, has stated that loans made by Credit Corporation to Fortner were unique and unusual and that money on such terms was not available from other sources in Louisville in 1960 through 1962. Certainly the borowing of money on the terms given, 100% of value for land acquisition, development and construction, was advantageous to Plaintiff. This was what was attractive to Plaintiff and made the financing uniquely compelling to Plaintiff. The horrendous result was that which Plaintiff did not anticipate. The advantages to Defendants were that they had tied up a captive market here and elsewhere for house packages while getting interest and ½ point on their loans.

(69) No party is coerced or compelled by force to sign tying agreements. Economic circumstances can necessitate the signing of such agreements just as they did in the *International Salt, Northern Pacific* and *Associated Press* cases, *supra.*

The Court places significance on that fact that the Loan Agreements, etc., were limited to a particular area of ground (313a). Legally this is of no significance since Plaintiff's proof meets the tests of the applicable cases. In direct point here is the *International Salt* case where

the salt which was required to be purchased under the tying agreements there was only that used in the International Salt Company machines and total sales of that salt to all 900 leaseholders amounted to only $500,000.00.

The Court in talking generally about money and land available has simply missed the point as to the applicable law.

Another point which the Court below deemed applicable was the claim by Defendants that Plaintiff could pay off the loans and be relieved of the obligations to purchase Homes Division houses. First, it is questionable from a reading of the Loan Agreement and other documents that Plaintiff could have relieved itself of that obligation by paying off the loans. The mortgage (45a) merely provides that the *conveyance* would become null and void upon payment of all sums due. But the mortgage also (44a) requires Plaintiff to perform each undertaking contained in the Loan Agreement. We have already seen that the Loan Agreement requires Plaintiff to erect on each lot a (70) house manufactured by United States Steel Homes Division (26a), and that the lien will be released only when proof has been furnished that a house manufactured by United States Steel Homes Division has been erected on each lot. It should also be noted that the land notes for purchase and development money would be paid off when the subdivision was about two-thirds completed but Plaintiff still had to furnish proof that a Homes Division house had been erected on *each* lot before the lien would be released. Secondly, it can clearly be inferred from the record that Plaintiff had been placed in a situation by the conduct of Defendants which made it impossible for Plaintiff to pay off any one, including the Credit Corporation. Thirdly, the record shows that the Plaintiff offered to pay the Credit Corporation and stated that it could pay off the

loans if relieved of the restrictive provisions of the Loan Agreements but the Credit Corporation adamantly refused. Here is evidence of the illegal intent of the Defendants. Fourthly, assuming that Plaintiff could have paid off the loans, this is completely immaterial under the law. In the *International Salt* case the lessees could have cancelled the leases and relieved themselves of the restraint. That specific question was raised in *Osborn* v. *Sinclair Refining Company,* 286 F. 2d 832 (C.A. 4th, 1960), in which the argument was made that the alleged tie-in was not exclusive in that the buyer was not required to take all his requirements from Sinclair (p. 838). The Court of Appeals also stated:

> (71) "The economic effect of the tying arrangement, not the degree of exclusivity, is the pertinent issue. The facts as found by the District Court make it clear that the power of Sinclair to appreciably restrain competition in TBA stemmed from Sinclair's position as supplier of more than 10% of the gasoline sold in the state of Maryland, and as gasoline supplier to more than 10% of the stations in the state, including the station leased to Osborn. The finding was that a not insubstantial amount of commerce is affected."

The Court in *Osborn* v. *Sinclair Refining Company, supra,* then held on facts parallel to those in the present case that there was a tie-in which unreasonably restrained competition. The Court at page 840 points out that arguments about monopoly and the "rule of reason" were beside the point since a tie-in is unreasonable *per se.*

The District then misconstrues the nature of the tie-in arrangement by talking about Plaintiff being able to purchase from Homes Division regardless of the loans. The houses were the *tied,* not the *tying* product. Certainly Plaintiff could have purchased the house packages whether

the loans were present or not. This was the product the Defendants wanted to sell. This is like the Defendant in the International Salt case claiming that its customers could have purchased salt from them even though they did not lease the machines. International Salt would obviously sell salt to any one and was using its leases to force sales of salt. (72) The District Court appears to have the tying and tied products reversed as a result of the confusion created by counsel for Defendants.

Plaintiff takes great exception to the language in the first paragraph of the Conclusions of Law section (315a) of the Court's Memorandum Opinion which alludes to an abandonment of a claim under Section 3 of the Clayton Act or to an "erroneous" complaint. This, of course, was caused by the literal adoption of the language proposed by Defendants.

The Memorandum Opinion (316a) gets the cart before the horse to a certain extent in saying that the Plaintiff must first prove the contracts illegal and then it could proceed to prove conspiracy, and if conspiracy is proven, then to prove damages. There is no precedent under the antitrust laws for such a proposition. The violation alleged is a contract, combination and conspiracy to violate Sections 1 and 2 of the Sherman Act. The evidence is that there was a combination and/or conspiracy under the meaning of the antitrust laws to impose the tying agreement on Plaintiff, with the agreement being the contract in restraint of trade. There was further subsequent coercive action taken to further the combination and conspiracy and the contract. The fact of conspiracy is important as bearing on the initial violations and liability.

The Court correctly cites the *Northern Pacific* case (317a) and then ignores the later controlling Supreme Court and Court of Appeals decisions and interprets

"sufficient economic power" as being monopoly power from a District Court decision, and *Times-Picayune* (73) *Publishing Co.* v. *United States*, 345 U. S. 594. The *Times-Picayune* case has been limited to its facts and is not regarded as controlling. See the discussion of *Times-Picayune* in the later *Northern Pacific* case, 356 U. S. 1, at pp. 10 and 11.

Contrary to the Memorandum Opinion (317a), Plaintiff has consistently argued that the Credit Corporation had sufficient economic power with respect to the tying product (financing) through the unique, unusual and attractive nature of the terms of its financing. This is clearly within the principles of the *Lowe's* and *Associated Press* cases, *supra*. The astounding conclusion then reached (318a) is that "obviously others, if they chose, could lend to Plaintiff money on the same terms and conditions as defendant Credit Corporation." This is a conclusion of fact or law made with no evidentiary support and smack in the face of the Affidavits of A. B. Fortner and Edwin Horn. The Court then says that the test is universal compulsion. There are and cannot be cited any cases to support this conclusion. There was no universal compulsion in the *Associated Press* case. That case specifically holds that the test was the unique desirability of one wire service to the Cincinnati newspaper which was sufficient and that who could better say what was unique or desirable than the *consumer himself*.

The Court then applies a relevant market concept concerning the tied product, the homes. The Court has stated that the test is that the tie-in result in a "substantial restraint upon competition in the market for the tied service" (318a). The actual rule of the Supreme (74) Court, quoted from *Northern Pacific*, is that "* * * a not insubstantial amount of interstate commerce is affected." As has previously been pointed out, there is no relevant

market test in the tie-in cases. As *Northern Pacific* and *International Salt* teach, the amount of interstate commerce of the tied product affected need only be more than *de minimus*. *International Salt* involved $500,000.00 of sales in the tied product. Speaking in terms of housing starts or amount of land available is therefore of no significance. What is significant is that the tie-in as to Plaintiff involved potential sales of $660,000.00, actual sales of $210,000.00, and that total sales affected by the tie-in agreements exceeded $3,000,000.00 in 1960 through 1962.

The Court was clearly influenced by *Tampa Electric Co.* v. *Nashville Co.*, 365 U. S. 320. The *Tampa Electric* case was not a tie-in case! It was a requirements contract case involving only one product where the *per se* rules of unreasonableness were not applicable. The relevant market concept then did come into play in that case, involving shares of market. This case holds at page 334 specifically that the requirements contract involved there was not a plainly restrictive tying arrangement, citing *International Salt, supra.*

The Tampa Electric case makes a statement at page 335 that the Defendants have twisted to their own purposes. The Supreme Court there held that Section 3 of the Clayton Act is broader in its coverage than are Sections 1 and 2 of the Sherman Act and that if the requirements contract in question in that case did not violate Section 3 it could not be a violation of Sherman (75) Act 1 and 2. The history of Section 3 of the Clayton Act is that it was passed to cover a possible loophole left in Sherman Act 1 and 2 with the intent of stopping certain restrictive practices at their outset which might in the future lessen competition or create an actual tendency to monopoly (see page 326 of the *Tampa Electric* opinion). This case recognizes itself that the necessity of direct

proof of economic impact of a tying contract is not required (p. 326).

While there may be some place in the law for summary judgments in antitrust cases, the Supreme Court in 1962 held that these procedures should be used sparingly, "trial by affidavit being no substitute for trial by jury, *Poller* v. *Columbia Broadcasting System,* 368 U. S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486." The *Poller* case involved allegations of conspiracy and on its facts is a much less appealing antitrust case than the present suit. The Supreme Court held emphatically that the defendant CBS was not entitled to Summary Judgment.

Summary

The evidence in the record establishes:

1. The Defendants approached Plaintiff.
2. The Defendants made unusual, unique and attractive offers of financing to Plaintiff.
3. The Defendants' purpose was to use Plaintiff to to obtain or expand their entry in the Louisville market.
4. As a condition of the unusual, unique and attractive financing, the Defendants required (76) Plaintiff to agree only to purchase and build in its subdivision homes manufactured by United States Steel.
5. The Defendants conspired to make this requirement.
6. A program of sales was opened and a number of sales were made through vigorous efforts of Plaintiff.

7. After the program had been started and as the first of the houses were completed and occupied numerous complaints attributable to Defendant, Homes Division, defects in the house packages arose.

8. The complaints and defects resulted in loss of profits to Plaintiff, loss of interest by the sales force and loss of reputation of the subdivision.

9. Plaintiff on a number of occasions asked to be allowed to build other houses besides Homes Division houses in the subdivision and was refused.

10. Meanwhile the Homes Division refused to do more than replace defective parts.

11. Homes Division furnished defective interior walls which could not be satisfactorily repaired and for which Homes Division would give no compensation.

12. Matters got so bad that Plaintiff could not sell houses in the subdivision.

13. At a showdown meeting in May, 1962, Defendants were formally requested to relieve Plaintiff from the restrictive tying provisions of the Loan Agreements and were steadfastly refused even though told that the loans would and could be paid off if such relief were granted.

(77) 14. The initial illegal conspiracy to obtain the restrictive Loan Agreement and following conspirational conduct to enforce the contract, combination and conspiracy did great and irreparable damage to Plaintiff.

15. The conspiracy was not limited to Plaintiff but covered all those with whom Credit Corporation dealt.

16. Approximately 70% of the Homes Division sales were accounted for by Credit Corporation Loans Agreements in numerous states containing the restrictive tying clause in 1960, 1961 and 1962.

17. Credit Corporation loans of about $22,000,000 in 1960, $19,000,000 in 1961 and $19,000,000 in 1962 were used to obtain $3,971,217.76 of Homes Division sales in 1960, $2,823,383.50 in 1961 and $2,289,819.00 in 1962. This is not an insubstantial amount of interstate commerce in the tied product.

18. The contract with Plaintiff alone involved a minimum of $600,000.00 of sales of the tied product and at least $210,000.00 of sales of the tied product actually occurred, which in itself is not insubstantial.

The necessary elements of violations of Sections 1 and 2 of the Sherman Act are all overwhelmingly present in this case and the Defendants were not entitled to Summary Judgment!